

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



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IN THE  
**United States Court of Appeals**  
For the Second Circuit

CITY OF DETROIT, *et al.*,

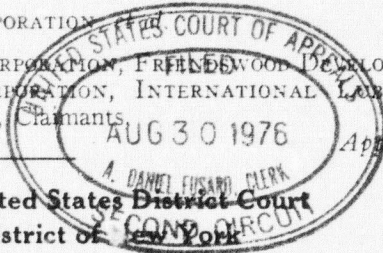
*v.*

GRINNELL CORPORATION

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT  
COMPANY, GARDEN STATE PLAZA CORPORATION, INTERNATIONAL LUBRICANT  
CORPORATION and SHELL OIL COMPANY, Claimants

Appellants.

On Appeal from the United States District Court  
for the Southern District of New York



**BRIEF OF COUNSEL FOR  
CLASS REPRESENTATIVES-APPELLEE**

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IN THE  
**United States Court of Appeals**  
For the Second Circuit

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Docket Nos. 76-7252  
76-7253 and  
76-7254

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CITY OF DETROIT, *et al.*,

*v.*

GRINNELL CORPORATION, *et al.*

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD  
DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORPORATION,  
INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY,  
Claimants,

*Appellants.*

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF OF COUNSEL FOR  
CLASS REPRESENTATIVES-APPELLEE**

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**Preliminary Statement**

This is a consolidated appeal taken by Exxon Corporation, Shell Oil Company and four other companies (hereinafter "Appellants") from a Final Judgment entered on April 27, 1976 (A1181)<sup>1</sup> awarding counsel fees of \$870,607 out of a class settlement fund now totalling, with interest,

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1. All "A" page references are to the Appendix filed by Appellants herein.

over \$12.2 million to David Berger, P.A., Attorneys at Law (hereinafter "Appellee"). Appellee is sole counsel for the three national classes in *City of Detroit, et al. v. Grinnell Corporation, et al.*, 68 Civ. 4026 (S.D.N.Y.) and two companion cases exclusively sharing in the above fund.

All of the Appellants are claimants to the above settlement fund. None of these Appellants filed its own action, objected to the terms of the settlement in the District Court, or appealed from the Final Judgment approving the settlement. Under the terms of the Final Judgment now appealed from, their combined share of the counsel fees awarded will be slightly over \$1000.

A detailed history of these actions is set forth in an earlier decision of this Court, *City of Detroit, et al. v. Grinnell Corp.*, 495 F.2d 448 (1974), *rehearing en banc denied*, (hereinafter "Grinnell I") affirming the District Court's Final Judgment approving the settlement of the above three national class actions and reversing a Final Judgment awarding counsel fees to Appellee.<sup>2</sup> This Court remanded the fee matter for further evidentiary hearings, noting that the lower Court had conducted the first fee hearing "... with only the benefit of oral argument and submitted papers to guide it in spite of the fact that counsel for the Appellants stated to the Court that he 'proposed to present evidence' on the matter of the fee application." 495 F.2d at 472. The Court set clear standards for determining counsel fees, specified particular factual "voids" that were to be filled at the new hearing and directed that Appellants herein were to be accorded the right to offer evidence and cross-examine witnesses.

After due notice to Appellants and prior service by Appellee of new detailed affidavits and documents, lengthy proposed findings of fact, and an extensive brief, a new hearing was held on November 10, 1975. Three senior at-

2. The Addendum to the Brief for Class Members—Appellants (hereinafter "Appellants' Brief") reproduces part of this Opinion and does not include the portions relating to approval of the settlement, which establishes the law of the case as to most of the facts relevant to evaluating the "risk of litigation" and "quality" or "results" of Appellee's legal services. The entire Opinion is attached herein as an Addendum.

torneys of Appellee testified and further documentary evidence was offered. Appellants offered no witnesses and a few documents including only affidavits that were already filed in the first fee hearing, two letters between counsel and the Court relating to the proper notice for the second fee hearing, and a chart relating to proposed settlement terms in other individual subscriber cases prepared subsequent to the original appeal herein. Judge Metzner decided the matter in April, 1976.

On June 11, 1976 Appellants moved this Court to postpone indefinitely briefing and argument of this appeal pending the outcome in the Third Circuit of a similar appeal taken by some of the same Appellants as herein against a counsel fee award to Appellee herein. Appellants argued that the anticipated *en banc* decision "... may well be dispositive of the instant appeals before this Court in the *Grinnell* fee dispute". (Appellants' Motion For A Stay, p. 4). That motion was denied. In an *en banc* decision filed July 2, 1976, the Third Circuit, affirming in part and reversing in part, upheld the District Court's decision on all matters relevant to this appeal, except for the award of monies from a class fund spent for time involved in actually petitioning for counsel fees. *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, Nos. 74-2189 and 74-2255 (Slip Opinion dated July 2, 1976) (hereinafter *Lindy II*).

These cases were originally filed in July, 1968 and settled for \$10.0 million plus interest in August, 1971. Over \$3.2 million still remains to be distributed to the over 14,000 class members who never appealed from the first fee award herein. Appellee itself has received no payment from either the settlement fund or its own clients for any of its work since 1968 in connection with this litigation. Appellee respectfully suggests that the circumstances of this case and the interests of the class members herein indicate that this Court should give consideration to an early decision on this appeal if not to summary affirmance of Judge Metzner's decision.

### Statement of Issues

1. Whether the District Court followed the legal standards previously set by this Court on remand in awarding \$870,607 in counsel fees to Appellee from the class settlement fund herein.

2. Whether the District Court made clearly erroneous findings of fact as to the value of Appellee's legal services in filing and prosecuting these national class actions and creating a settlement fund currently totalling over \$12.2 million.

### Statement of the Case

#### The Government Case

The national class actions in issue here developed out of an injunctive action brought by the United States, *United States v. Grinnell Corp., et al.* (D.R.I. Civ. 2785). The government case was directed primarily to the charge of monopolization under §2 of the Sherman Act, supported by evidence of predatory pricing in cities where the defendants experienced competition. The trial was held in June, 1964, and no evidence was presented relating to activities after 1961 (A519). On November 27, 1964, Judge Wyzanski filed an opinion finding violations of the Sherman Act, *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), and entered a decree. The government appealed on the relief granted and the defendants appealed on the finding of liability.

On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the District Court in part, reversed in part, and remanded for further hearings on relief. 384 U.S. 563. The remand directed that the District Court consider divestiture of the assets of defendant ADT on a city-by-city basis (at pp. 577-578). Justice Douglas, writing for the majority, conceded that a localized market analysis could show that some cities might not support more than one accredited central station. Justice Fortas, joined by Justice Stewart, dissented on the grounds that the monopolization

finding rested upon illogical and unrealistic definitions of both the service and geographic market. Justice Fortas noted that the remand directed consideration of localized relief, an indication of the economic realities involved, and pointed out that in at least 20 of the cities in which the defendants had no competition from other "accredited central stations," the relevant service market, they were found to have been losing money because of "fringe competition". Justice Harlan also dissented on the issue of service market definition and likewise noted that while a national market might be found for §2 injunctive purposes, "... immediate competition takes place only within individual communities ... " (at pp. 583-584).

After over a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from generalized injunctive relief, including a prohibition against predatory pricing "at unreasonably low charges" (§V[B]), the final decree directed varying amounts of divestiture of the assets by ADT in only 21 of the 115 cities ADT served.

### The Private Cases

Two treble damage actions were brought in the United States District Court for the Eastern District of Pennsylvania by competitors of the defendants, *Robinson Electric Protective Corp. v. Grinnell Corp., et al.*, Civ. No. 27961, and *Sentinel Alarm Corporation v. Grinnell Corporation*, Civ. No. 36061. The theory of these cases was that the defendants, beginning in 1958, had attempted to drive them out of business by predatory pricing. After extensive discovery covering pricing practices, the defendants settled the cases prior to trial.

Thereafter, a series of suits was instituted by both competitors and subscribers of the alarm company defendants. Suits were filed by over 48 competitors of the defendants relating to alleged predatory pricing practices in over 30 cities throughout the United States. In addition to the three suits filed by Appellee, over 54 other subscriber actions were filed by other counsel, including a suit filed by counsel for Appellants. *R.H. Macy & Co., Inc. v. Grinnell Corp.*,

*et al.*, 67 Civ. 2258 (S.D.N.Y.). While the majority of these subscriber actions were filed before those filed by Appellee, none of the firms involved attempted to represent a subscribers' class of any size. No other subscribers' suits were ever filed as a class action except for three later state-wide government class actions. The total commerce involved in the subscribers' actions other than those brought by Appellee was approximately 6¼% of the business done by defendants.

### **The National Class Actions**

In July, 1968, Appellee filed three national class actions in the United States District Court for the Eastern District of Pennsylvania for all governmental, commercial and industrial subscribers of the defendants. The breadth of the classes, which was maintained in the settlement, was such that virtually all subscribers in the country over an 11¼ year period were involved.

On October 3, 1968, the national class actions were transferred pursuant to 28 U.S.C. §1407 to the United States District Court for the Southern District of New York. After extensive discovery was undertaken by the competitor plaintiffs to develop the predatory pricing theory, the defendants—prior to any settlement with subscriber plaintiffs—settled all but one of the competitor cases for over \$12 million. One group of these competitor plaintiffs settled for \$6.3 million, although some of those “competitors” had never engaged in the service market defendants were held to have monopolized (A389).

Upon consolidation of the cases, a steering committee of plaintiffs' counsel was established to coordinate all competitor and subscriber plaintiffs' discovery. Appellee served on the committee and drafted the original Motion for Production of Documents. Appellee likewise engaged in review and finalization by the Committee of the joint set of plaintiffs' interrogatories.<sup>3</sup> Eventually competi-

3. Appellants' assertion that no documents were produced as result of Appellee's work on discovery and that Judge Metzner made no findings in his first opinion that Appellee made any contribution to the consolidated pre-trial discovery is *false*, as seen by reference to the Opinion itself (A615). Furthermore, the Record details Appellee's discovery contributions (A105-107, 1030-31, 1038-43).

tor and subscriber plaintiffs stopped coordinated discovery because the interests of the two groups relating to the proof of impact and damages rested upon diametrically opposed theories (A105-107, 440, 1030-1031, 1038-1043).

Appellee alone prepared the substantive cases for the three national classes, undertaking a review and analysis of the government record, as well as an inspection of the contents of the document depository established by the defendants (A106). Appellee prepared and circulated to counsel in other individual subscriber cases a memorandum relating to substantive matters. Appellee received no memoranda from other counsel relating to the substantive case (A405).

The defendants moved for partial summary judgment alleging that the applicable statute of limitations was tolled only through June 13, 1967. Appellee was one of the five firms participating in the steering committee established to coordinate the response of all competitor and subscriber plaintiffs to the summary judgment motion. Appellee prepared the initial draft of the plaintiffs' joint brief submitted to the District Court (A108-109, 440-441). This draft contained an extensive argument for the independent application of §§5(a) and 5(b) of the Clayton Act (A453-472). Other members of the steering committee removed this argument from the final joint brief. The District Court denied defendants' motion in an opinion which relied upon the theory of independent application of §§5(a) and 5(b). *Russ Togs, Inc. v. Grinnell Corp.*, 304 F. Supp. 279 (S.D.N.Y. 1969).

The summary judgment decision was appealed to this Court. Appellee participated in the preparation of the brief filed for all plaintiffs (A108, 441). Upon Appellee's vigorous insistence (A476-480), the argument relating to the independent application of §§5(a) and 5(b) was inserted in the plaintiffs' joint brief. Appellee and counsel for a competitor plaintiff both argued before this Court (A108, 441-442). The Court affirmed the District Court's decision, relying primarily upon the independent application theory. 426 F.2d 850 (2d Cir. 1970).

Defendants filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. Appellee participated in drafting papers in opposition (A108, 442-443, 484-492). The Supreme Court denied certiorari. 400 U.S. 878 (1970).

At an early stage in the proceedings a motion was made to dismiss the action against defendant Automatic Fire Alarm Company of Delaware because it was not in existence at the time the suit was filed, having been acquired by Automatic Fire Alarm Company. Appellee filed a Motion to Amend for the class plaintiffs under F.R.C.P. Rule 15(c), requesting the Court to substitute the latter company as a defendant relating back to the original filing date of complaints (A108-109). This motion was granted.

Appellee alone moved in 1969 to have the instant actions certified as class actions. This motion was stayed pending the outcome of the summary judgment issue by order of the District Court (A109).

Oral argument was presented to the District Court on the issue of class certification on June 18, 1971. Appellee alone presented the case for class certification. No other counsel appeared to represent any of the classes or any member of the classes. Appellee alone researched, prepared and filed all papers in support of class certification (A110, 444).

### **Settlement of the Class Actions**

Appellee alone initiated settlement negotiations with the defendants in the class actions beginning on February 16, 1970. No progress was made until immediately following the oral argument on class certification. Thereupon, Appellee alone negotiated the \$10 million plus interest settlement and the details of the settlement agreement for the three national classes as defined in the class complaints, covering all purchases over an 11¼ year period.<sup>4</sup> No other plain-

4. Appellants repeated assertions (Appellants' Brief, pp. 6, 16, 30) that the settlement was easily negotiated because "Petitioner" spent only 51½ hours on "Settlement Negotiations" and that all such time was "reconstructed" are false. Based upon detailed affidavits

(footnote continued on next page)

tiffs' counsel were present at any of the negotiating sessions (A111-112, 444). Appellee alone presented the settlement to the District Court in the Fall of 1971.

Legal notice approved by the District Court of the proposed settlement and of Appellee's request for a 25% attorneys' fee was mailed on December 23, 1971 to each of the then current 89,816 subscribers of defendants ADT, Holmes and AFA and also published in The New York Times and The Wall Street Journal. Under the settlement agreement the defendants paid all notice costs. Appellee responded to the numerous communications resulting from such notice (A112-113).

As provided by Settlement Order No. 1, a class action committee consisting of Appellee and attorneys for the defendants was established to oversee management and administration of the Notice program. In fact, Appellee assumed full responsibility for administration of the three class actions.

All claims and exclusion requests were initially reviewed by Appellee and challenge letters were sent to all challenged claimants. Over 14,000 claims were processed and over 3,200 challenge letters sent. A number of plaintiffs who filed independent actions chose to file claims against the Settlement Fund. Appellee prepared and filed papers in opposition to, and successfully argued against, motions to extend the date for exclusion and to undertake voluminous discovery (A115).

Hearings on approval of the settlement took place on May 24, 1972 and May 25, 1972. A small number of objectors filed memoranda and affidavits in opposition to the proposed settlement. Appellee alone, among all plaintiffs' counsel, prepared and filed papers in support of, and orally argued for, approval of the settlement. None of the instant Appellants filed any papers in opposition to the settlement.

and testimony, Judge Metzner found that all attorneys of Appellee expended 244.5 hours on "Settlement Negotiations" (A1172). Of that time, 51.5 hours was expended by David Berger *alone* (A972), and only 10 hours of *that* 51.5 hours of Mr. Berger's time was "reconstructed" (A885). Furthermore, the 51.5 hours attributed to Mr. Berger for his preparation for and participation in "Settlement Negotiations" was understated because of the conservative reconstruction techniques employed by Appellee (A783-784).

Appellee filed a petition with supporting affidavits and a memorandum of law for an attorneys' fee of \$2.5 million, plus disbursements (A101-220). Four law firms, representing individual plaintiffs, also petitioned for fees. They filed affidavits and memoranda admitting that Appellee performed the activities described in his affidavits, but questioning the relative value of *some* of Appellee's services as against their own activities in their own suits which were said to have so benefited the classes as to entitle them to participate in the fees awarded Appellee (A236-245, 246-255, 256-259, 260-273, 287-289, 290-304).

A hearing on Appellee's fee request was held on June 5, 1972. No testimony was taken or further evidence offered. The Court denied Appellant's request to "present evidence".

On December 27, 1972, the District Court filed its decision approving the settlement and awarding \$1.5 million in attorneys' fees to Appellee. *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380 (S.D.N.Y. 1972) (A574-617). The Court also stated that the other four petitioning firms had standing to assert claims against the fee awarded Appellee.

A Final Judgment was entered on January 23, 1973 approving the settlement. A small group of claimants filed a Notice of Appeal from approval of the settlement. However, pursuant to the terms of the settlement, the principal sum of \$10,000,000 began earning interest as of January 23, 1973 at the rate of one point above the prime rate.

A Final Judgment on the attorneys' fees was entered January 26, 1973. It awarded \$1.5 million plus disbursements to Appellee and retained jurisdiction for purposes of determining whether the four other petitioning firms were entitled to share in this fee. Appellants herein alone appealed that Judgment.

Appellee alone represented the national classes on the appeal from the Judgment approving the settlement. Appellee alone filed briefs and orally argued for the national classes on that appeal.

On March 13, 1974 this Court affirmed the Judgment approving the settlement and reversed and remanded for further hearings the Judgment awarding counsel fees to

Appellee. In affirming the approval of the Settlement, this Court found that the case for the national subscriber classes on both liability and damages was highly contingent but that the Settlement "... was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." 495 F.2d at 458.

In reversing and remanding for further hearings on the fees awarded Appellee, this Court held that Appellants herein were entitled to a full evidentiary hearing, on disputed factual issues. The Court also set new standards for awarding counsel fees and held that the District Court had erred in not filling "factual voids" in the record. 495 F.2d at 472-73.<sup>5</sup> The remand opinion stated that a fee of \$1.5 million, which it calculated resulted in an award of over \$635 per hour based on the then current record in the case, was "excessive." 495 F.2d at 468, 472.

In determining the applicable standards for awarding counsel fees, this Court reiterated that lower courts were still required to consider all the traditional factors normally taken into account in setting fees:

"There are many parameters that affect the value of legal services and which, therefore, must be considered by a court evaluating a fee request. In another recent antitrust case the District Court which granted the instant fee petition enumerated those parameters ... viz:

(1) whether a plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

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5. The only specific "disputed" fact noted by this Court related to the amount of hours expended by Appellee. 495 F.2d at 472-473. The "factual voids" were said to include: (a) the lack of definition of "senior attorney" in the original fee petition; (b) the lack of any breakdown of the hours of the "senior attorneys" by each attorney; (c) the lack of any breakdown of hours "into the various facets of the case"; (d) the lack of any evidence as to the paraprofessionals' experience and training, as well as their wages; and (e) "insufficient evidence" as to Appellee's separate fee arrangements with class members who were clients. 495 F.2d at 473. Uncontradicted evidence was supplied to fill all these "voids" at the remand hearing.

- (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,
- (3) time and labor spent,
- (4) magnitude and complexity of the litigation,
- (5) responsibility undertaken,
- (6) the amount recovered,
- (7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,
- (8) what it would be reasonable for counsel to charge a victorious plaintiff. 312 F.Supp., at 430.

Finally, the District Court added that the attorney's 'risk in litigation' is another factor to be considered." 495 F.2d at 470.<sup>6</sup>

This Court went on to hold that henceforth District Courts would be required to begin their inquiry by first calculating the basic minimum value of the services of the petitioning firm by determining (a) the number of hours expended by each attorney involved, (b) the types of work done by each attorney, and (c) the hourly rates normally charged for similar work by attorneys of like skill based upon hourly rates of compensation, without reference to risk of litigation, results, or other factors. 495 F.2d at 470-71. After thus determining the basic non-contingent billing value of the "time and labor spent", this Court held that the "... other, less objective factors, can be introduced into the calculus." 495 F.2d at 471.

The only comment made by this Court concerning these "other, less objective factors", was to note that the concept

6. Thus, in *Grinnell, supra*, this Court did not depart from its prior holding in *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050-53 (2d Cir. 1973), *cert. denied*, 414 U.S. 1092 (1973), where a unanimous panel explicitly held that all these factors had to be considered in awarding fees in antitrust actions under the equitable fund doctrine.

of "risk of litigation" included traditional fee award elements such as the practical benefits from a related Government action, the novelty and complexity of the issues, and the responsibility assumed by counsel in view of previously filed civil actions instituted by others. 495 F.2d at 471. The Court concluded its discussion by stating that the proper guidelines for a remand hearing had been summarized by the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation*, 487 F.2d 161 (3d Cir. 1973) (hereinafter *Lindy I*), which held that the value of these additional factors would vary from case to case. 495 F.2d at 473.<sup>7</sup> This Court declined to consider at that time the standing of other petitioning counsel to share in Appellee's fee.<sup>8</sup>

Pursuant to Settlement Order No. 3, dated September 30, 1974, Appellee alone was given full responsibility for all further class action administration, including control over investment and disbursement of settlement funds and res-

7. In *Lindy I*, *supra*, the Third Circuit stated that once the lower court had determined (1) the number of hours spent in various legal activities by individual attorneys and (2) the reasonable hourly rates for the individual attorneys (as determined by their standing and experience), there would still be "at least two other factors that must be taken into account in computing the value of attorneys' services." The first of these additional factors was said to be (3) "the contingent nature of success." In examining this factor, according to *Lindy I*, the court is to determine, among other things, whether the attorney has private fee agreements guaranteeing payment regardless of any recovery, and any facts reflecting probability of success in the particular case. The final additional factor to be considered is (4) the "quality of an attorney's work." As part of this analysis, the lower court is to consider "... the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." *Lindy I* noted that the amount of recovery "... may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings." 487 F.2d at 168. The Third Circuit's recent decision in *Lindy II*, which reaffirmed these standards, but *prospectively* set further guidelines for application of the "risk of litigation" and "quality" elements, will be discussed *infra*.

8. Prior to the remand hearing, Appellee settled the claims made by other petitioning counsel (A1086-1089). Under these agreements Appellee will pay these four firms a total of \$120,000 out of its award of \$870,607. Their original petitions sought 35% of Appellee's fee.

olution of all outstanding challenges to claims. A hearing was held on November 25, 1974 on all outstanding challenges to claims. Appellee represented the class at such hearing. As a result of Appellee's briefs and oral argument substantial claims were disallowed (A908-910).

As of October 23, 1975, defendants had paid into the Settlement Fund the principal sum of \$9,025,000. As a result of the provisions of the Settlement Agreement, which were novel at the time this settlement was reached, the total interest earned on the \$10,000,000 principal will cause the gross Settlement Fund ultimately to exceed \$12,200,000. On March 31, 1975, 13,712 checks were distributed to claimants in the amount of \$9,357,777.14 (A908-910).

In April, 1975, Appellants were informed that the remand hearing on counsel fees would be held in the Fall of 1975 (A1090). Appellee offered Appellants the opportunity to undertake any pre-trial discovery they required, including examination of Appellee's time records and any other documents supporting time expended (A1091). This offer was declined. Appellants demanded that the over 14,000 class claimants who had not appealed the first fee award be notified of the pendency of a new fee hearing. The District Court declined to order such notice (A1161-1163).<sup>9</sup>

The District Court directed both parties to file all relevant pre-trial papers on October 31, 1975. Appellants filed a brief along with a one-page exhibit (A740-767). Appellee served detailed affidavits and documents, lengthy proposed findings of fact and an extensive brief (A638-739, 876-1085). Appellee requested counsel fees totalling approximately \$1,248,000. Appellants filed no responding papers. The remand hearing was held on November 10, 1975. Appellee offered evidence in the form of testimony by the three senior attorneys responsible for these actions—all of whom were cross-examined by Appellants—as well as further

9. In *Alpine Pharmacy Inc. v. Chas. Pfizer & Co., Inc.*, 1973-2 Trade Cases ¶74,826 (SDNY 1973), Judge Wyatt similarly held that notice of a remand proceeding on the award of counsel fees need only be given to class members who had appealed the first fee award. *Ibid*, at pp. 95,675-676.

documentary evidence.<sup>10</sup> Appellants offered no witnesses and only a few documents.

In an Opinion dated April 21, 1976 (supplemented by an Opinion of April 26, 1976 correcting a typographical error) Judge Metzner, who had handled the entire litigation, awarded Appellee counsel fees of \$870,607 plus disbursements of \$53,267.50 for employment of paraprofessionals and \$27,505 for employment of professional accountants in connection with these actions.<sup>11</sup>

Judge Metzner's Opinion explicitly followed the remand instructions of this Court. First, the District Court determined the number of hours expended by each attorney on each relevant category of activity based upon contemporaneous time records and careful reconstruction of *some* time for *some* attorneys for *certain* noted periods (A1166-1167, 1172-1173).<sup>12</sup> Second, based upon detailed evidence of the experience and reputation of Appellee's attorneys in the antitrust field, awards to the same counsel in other cases, and the time period in which the services were expended, the Court assigned specific basic hourly rates to each of Appellee's attorneys (A1170-1172). After determining that the total "basic fee" thus due Appellee based upon such minimum time charges was \$352,765.75, Judge Metzner, guided by this Court's findings in its earlier detailed opinion and the facts already found in his earlier opinion approving the settlement, adjusted this basic award upwards to \$870,607.00 (A1173).<sup>13</sup> In making the final award, Judge Metzner shifted hours from one category of

10. The affidavits filed on October 31, 1975 were verified by testimony at the hearing and supplied all the information required by *Grinnell I, supra*. The implication in Appellants' Brief (p. 12) that the affidavits relied upon by Appellee were the same ones before the Court at the first fee hearing is incorrect.

11. Appellants apparently are not appealing the reimbursement for costs in connection with the employment of paraprofessionals and professional accountants (A1184-1189).

12. Approximately 712 hours, or less than 20% of the total of 3577.75 hours found to have been expended, was "reconstructed". (A885-886, 980-998).

13. Based upon the 3,577.75 hours of attorneys' time found by Judge Metzner, this award represents a final "mixed rate" of approximately \$243 per hour.

legal activity to another and made different degrees of adjustment to different categories of activity and no adjustments to two categories (A1172-1174).<sup>14</sup>

Judge Metzner also found that although Appellee had contingent fee contracts with its clients calling for total payments of \$44,054, it had agreed on the record to waive any compensation from its own clients at a rate higher than that assessed against other class claimants (A879, 900-901, 904, 906, 1174).

A Final Judgment awarding such fees and costs was entered on April 27, 1976 (A1181-1183). Appellants filed a notice of appeal from the portion of the Judgment awarding counsel fees of \$870,607 on May 21, 1976 (A1184-1189).

## ARGUMENT

**The District Court did not abuse its discretion in awarding counsel fees of \$870,607 to Appellee for its legal services in creating a \$12.2 million class fund.**

### I. Introduction

These Appellants have argued a shotgun array of contentions, including a number of points on which this Court has already found facts contrary to Appellants' assertions. In reality, the issues on this appeal are quite simple and, on the state of the record, lend themselves virtually to summary affirmance.

The first question is whether Judge Metzner applied the legal standards set by this Court for determining Appellee's counsel fees. This Court held that the District Court was first to determine the number of hours expended on this litigation by each attorney on various types of legal activity and then multiply these figures by standard hourly billing rates appropriate to each attorney in light of what similar attorneys would normally bill on a non-contingent basis without adjustments for risk of litigation or results achieved. The District Court was directed to then adjust

14. The final award reflects an overall adjustment of the basic fee by a factor of less than 2.5.

this minimum valuation based upon the other elements relevant to setting counsel fees, such as the "risk of litigation" and "quality of work". This is exactly the procedure that was followed by Judge Metzner in awarding counsel fees to Appellee.

The second issue is simply whether Judge Metzner's findings of fact are so clearly erroneous and unsupported by credible evidence that the final award should be reversed.<sup>15</sup> *Lindy II*, *supra*, applied this "clearly erroneous" standard in a parallel fee litigation involving essentially the same parties as herein to affirm District Court findings on, for example, (a) the hours expended by counsel, including those based upon "reconstructed" time,<sup>16</sup> (b) which activities benefited the class,<sup>17</sup> and (c) the facts of the litigation relevant to evaluation of "risk" and "quality."<sup>18</sup> Judge Metzner's relevant factual findings are extensively supported by detailed affidavits, testimony and documentary evidence, as well as findings already made or affirmed by this Court in its earlier opinion, and findings about this Appellee made by other Courts in recent fee litigations.<sup>19</sup> And Appellants have offered virtually no evidence to contradict any relevant findings.

The final issue is whether the District Court's adjustment of the minimum basic value of Appellee's work from \$353,765.75 to \$870,607.00 was an abuse of discretion. In affirming *en banc* Judge Harvey's doubling of the minimum basic value for virtually all categories of time on a

15. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." F.R.C.P. Rule 52(a).

16. Slip Opinion, p. 7.

17. *Ibid*, pp. 7, 12.

18. *Ibid*, p. 17.

19. For example, a number of courts have already used the same hourly rates for various attorneys of Appellee as used by Judge Metzner herein. Similarly, all six judges in *Lindy II* affirmed the finding that a reconstruction of Appellee's time records therein identical to that done herein correctly stated the hours expended. (Slip Opinion, p. 7.)

similar remand hearing, *Lindy II*, *supra*, held such adjustment a proper exercise of the District Court's discretion. In describing the scope of appellate review on this point, the Court quoted from a Ninth Circuit decision in *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942):

"... Discretion, in this sense, is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court. . . ." (Slip Op. at p. 19.)

The majority in *Lindy II*, *supra*, held that the burden of showing such abuse or irrationality is on Appellants and that the award could not be reversed because the particular panel may have decided differently.<sup>20</sup> This reflects the long-established rule that it is within the discretion of the District Court to determine reasonable attorneys' fees.<sup>21</sup> Given the prior detailed findings of this Court as well as the detailed findings of the District Court in two opinions, it can scarcely be said that Judge Metzner's adjustment to the basic minimum fee herein was "irrational" or "arbitrary". Further, the overall degree of adjustment made by Judge Metzner—between two and three times the basic fee—parallels the adjustments given for "risk", "quality" and "results" in recent fee awards made by various District Courts applying the *Grinnell I* standards to lead counsel in major antitrust class actions.

In *Grinnell I*, this Court gave these Appellants the opportunity to employ the full tools of pre-trial discovery and

20. Slip Opinion at p. 20.

21. *Montague & Co. v. Lowry*, 193 U.S. 38, 48 (1904); *Trans World Airlines, Inc. v. Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970), *Straus v. Victor Talking Machine Co.*, 297 F. 791, 805-806 (C.A. 2, 1924); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834 (E.D. Pa. 1971), *aff'd sub nom.*, *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971); *South East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767, 794 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Armco Steel Corp. v. State of North Dakota*, 376 F.2d 206, 212 (8th Cir. 1967).

trial advocacy to examine and challenge Appellee's factual claims and to present the alleged "evidence" that they earlier represented to this Court would be submitted at a full adversary hearing. However, Appellants sought no pre-trial discovery, offered no witnesses, engaged in limited cross-examination at the hearing and introduced a few irrelevant post-*Grinnell I* documents. Having developed no record to support their burden of showing that Judge Metzner abused his discretion and made clearly erroneous findings of fact they now demand this Court adopt their unsupported view of the relevant facts. Alternatively, Appellants request, in effect, that this Court modify and complicate the standards set down in *Grinnell I, supra*, in an attempt to circumvent the fact that Judge Metzner followed precisely the mandate of this Court's earlier decision. *Lindy II, supra*, rejected a similar attempt by these Appellants:

"We find it necessary also to observe that we did not and do not intend that a district court, in setting an attorneys' fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief. Once the district court determines the reasonable hourly rates to be applied, for example, it need not conduct a minute evaluation of each phase or category of counsel's work." (Slip Op. at p. 22).

**II. The District Court's finding that \$352,765.75 represented the minimum basic value of Appellee's work herein was not clearly erroneous.**

In his April 21, 1976 Opinion, Judge Metzner found that Appellee expended a total of 3577.75 hours in connection with these litigations through the filing of its petition.<sup>22</sup>

22. Appellants imply in their brief (p. 9) that there is something peculiar about the fact that Appellee's first fee petition claimed 2,357 hours. The first petition included time only through April 19, 1972 (A124-125), and thus did not include substantial time subsequently

(footnote continued on next page)

This finding rests upon affidavits supplemented by the testimony of the three attorneys of Appellee who accounted for 80% of the time expended. The Record contains a detailed breakdown of the time expended by each attorney in connection with eleven separate categories of legal activity (A971-973).<sup>23</sup>

The District Court noted that for certain specified periods some attorneys did not have daily time records.<sup>24</sup> Submitted affidavits detailed how the time expended during these periods was conservatively reconstructed by reference to pleading files, the time records of other attorneys, and other contemporaneous documents. Each attorney was cross-examined<sup>25</sup> concerning such reconstruction techniques and the methodology of categorization.<sup>26</sup> Judge Metzner concluded: "After hearing the evidence I find that the hours allocated for the periods that were not covered by time records are fair and reasonable." (A1167).

The reconstruction techniques utilized by Appellee herein were identical to those used for reconstruction of time

spent obtaining approval of the settlement in the District Court, the time spent (236.75 hours) on the settlement appeal in this Court (A883, 973), and other work challenging claims and on settlement administration. Almost 84% of the 3577.75 hours was expended prior to this Court's opinion approving the settlement in March, 1974 (A879-880).

23. A detailed description of the records supporting the hours listed therein, the manner in which other time was reconstructed where contemporaneous records were unavailable and a day-by-day breakdown of the time expended by each attorney where time records were available is also in the Record (A876-888, 911-973, 980-1000).

24. Approximately 20% of Appellee's time was reconstructed.

25. The uncontradicted testimony upon cross-examination was that these attorneys actually spent more time on the litigation than was established by the reconstruction (A771). For example, it was stated that a substantial amount of the time of Mr. Berger spent in preparing for settlement negotiations was not submitted because no contemporaneous documents were available (A770-791, 795-806, 860-864).

26. Appellants' criticism of Mr. Montague for not bringing his "work sheets" to the hearing (Appellants' Brief, p. 37) is somewhat disingenuous since they turned down Appellee's pre-trial offer that they examine its time records and supporting documents.

expended by the same attorneys in *Lindy II*, *supra*.<sup>27</sup> Judge Harvey's finding that all such reconstructed time correctly stated the time expended was affirmed by all six judges sitting *en banc* in *Lindy II*.<sup>28</sup>

*Grinnell I*, did not specify the "categories" to be used in breaking down the time expended by each attorney.<sup>29</sup> The categories adopted herein correspond to those generally used in setting counsel fees and provide a rational basis for analyzing the nature of the work done by Appellee's attorneys.<sup>30</sup> The type of legal activity included within each such category is explained in detail in the Record (A780-790, 881-884).

The setting of standard hourly billing rates applicable to each attorney is a matter within the discretion of the District Court. As stated in *Lindy I*, *supra*, at 169, the District Court can rely upon its own expertise as to the normal billing rates that would be currently charged on an hourly basis for attorneys of like skill, and standing.<sup>31</sup>

27. Appellants brought out this point twice in their cross-examination of Mr. Newberg (A798-799, 803).

28. Slip Op. pp. 6-7 (majority): p. 33 (dissent). The arguments in Appellants' Brief (pp. 35-39) attacking the validation of "reconstructed" time by Judge Metzner ignores the holdings of *Lindy II*, *supra*, on this point. Appellee's reconstruction technique was also approved in *In re International House of Pancakes Franchise Litigation* (W.D. Mo. 1975) (Order Awarding Attorney Fees dated July 11, 1975 and Exhibit to Petition of David Berger, P.A. entitled "Hours and Hourly Rates—David Berger, P.A.—International House of Pancakes Litigation"). The cases cited by Appellants do not hold that reconstructed time cannot be compensated, but only that lower courts should require more than mere estimates by petitioning counsel.

29. The Opinion mentioned, without elaboration, the categories of "... discovery, oral argument, negotiation . . ." 495 F.2d at 471.

30. The use of virtually identical categories in setting Appellee's fees on the remand hearing in *Lindy*, *supra*, 382 F.Supp. at 1005 was affirmed by *Lindy II*, *supra*.

31. In *TWA v. Hughes*, *supra*, decided in 1970, this Court affirmed a holding of Judge Metzner that a proper "mixed rate" on a non-contingent hourly basis for an experienced antitrust firm where almost two-thirds of the time was expended by associates and when the litigation itself was commenced in 1961, was \$75 per hour. 312 F.Supp. at 484. The analogous non-contingent "mixed rate" herein, where 85% of the time expended was by attorneys at a "partner" level in a litigation beginning seven years later, is under \$100 per hour.

Judge Metzner had before him evidence detailing the personal career histories and experience of each of Appellee's attorneys involved in this litigation (A888-901). Despite Appellants' *ad hominem* arguments, there can be no serious question that Appellee and its attorneys, particularly the three senior counsel (David Berger, H. Laddie Montague, and Herbert B. Newberg) who primarily conducted this litigation, are today—and were throughout this case—among the nation's most well-known and successful plaintiffs' antitrust lawyers.<sup>32</sup> These three attorneys have not only participated in many of the most significant and successful private treble damage actions of the last decade, but in many of such cases were *lead counsel* (A890-896). Furthermore, their status has been repeatedly recognized by the federal courts.<sup>33</sup>

32. Despite Appellants' assertions to the contrary, reputation and experience are critical factors in determining applicable minimum hourly rates.

33. *Lindy Bros. Builders, supra*, 382 F.Supp. at 1010-11, 1020-22; *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557, 559 (E.D. Pa. 1969); *Professional Adjusting Systems of America, Inc. v. General Adjusting Bureau*, 352 F.Supp. 648, 651 (E.D. Pa. 1972).

Recently on the remand in the *International House of Pancakes Litigation, supra*, directed by the 8th Circuit following *Grinnell I, supra*, to obtain the more detailed time and hourly rate information now required, Judge Collinson said:

"As stated in the opinion of the Court of Appeals, Mr. David Berger has a national reputation in the field of anti-trust class litigation and this Court has found the services of Mr. Berger and his associates in this litigation to be of the highest quality." (Order Awarding Attorney Fees dated July 11, 1975, at p. 2.)

In determining Appellee's fee therein, Judge Collinson utilized "standard hourly rates" of \$200 per hour for Mr. Berger and \$100 per hour each for Mr. Newberg and Mr. Montague for all time expended since the commencement of the litigation in 1970.

The status of Appellee's attorneys involved in this case was noted even by Mr. Sondericker, counsel for one of the *defendants* in *opposing* earlier an award of \$2.5 million:

"However, I say, in any event, that the primary reason in my mind for the settlement is Mr. David Berger and the reputation he bears from my personal experience in opposition to him in the electrical cases in Philadelphia a good many years ago." (A559-560).

Judge Metzner, who had observed the quality of Appellee's work throughout these proceedings, made the following findings concerning the skill and reputation of David Berger and his colleagues:

"In view of counsel's success in numerous other large class action lawsuits in the antitrust field, he obviously is a highly competent attorney in this field, with partners and associates of the same calibre. His work in this case demonstrated a high degree of skill." (A1167).

The Court then made the following finding as to the reasonable minimum hourly rates to be applied herein:<sup>34</sup>

"A reasonable hourly rate for the attorneys who worked on this case, taking into account the periods of time when the services were rendered, is as follows:

David Berger	\$125.00
Herbert B. Newberg	100.00
H. Laddie Montague	100.00
Harold Berger	100.00
Alexander Frey	100.00
Warren D. Mulloy	100.00
Leonard Barrack	45.00
Joseph R. Lally	45.00
Bruce C. Cohen	60.00
Joel C. Meredith	60.00
Gerald R. Rodos	50.00
Alan M. Lerner	45.00
Merril G. Davidoff	50.00
Barry N. Shaw	85.00
Earl D. Greenburgh	50.00
Pauline C. Cohen	75.00
Howard L. Schambelan	65.00" (A1170-1171).

The hourly rates found by Judge Metzner reflect reasonable estimates of the standard hourly rates that would have been

34. The years of admission for each of these attorneys is shown in the Record (A888-900). It should be noted that Judge Metzner carefully lowered the requested hourly rates as to eight of these attorneys.

billed, without reference to premiums for contingencies and results achieved, by experienced antitrust firms for attorneys of like skill and experience.<sup>35</sup> In addition, these hourly rates correspond to the hourly rates utilized recently by judges in this District and other Districts in determining awards to securities and antitrust specialists in major class actions.<sup>36</sup>

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35. In the earlier proceedings herein, Mr. Simon, counsel for Appellants, argued that \$75 per hour represented a proper mixed rate, in the *TWA* circumstances for experienced antitrust counsel as of 1965-1966. He admitted that some additional "degree of inflation" was necessary in setting standard billing rates for Appellee's work herein and contended that such a "mixed rate" (plus something for inflation) should be used in setting the starting point in determining Appellee's fee. (Transcript of Hearing of June 5, 1972 at p. 66.) Between October, 1965 and the November, 1975 fee hearing, the Consumer Price Index for the New York City metropolitan area had risen over 73% (A699). At the same June, 1972 hearing, Mr. Reyecraft, a well-known antitrust practitioner and counsel for another Objector to the fee, argued that, based on his view of the risk involved, the time of Messrs. Berger, Montague and Newberg since the commencement of the litigation should be charged at \$150 per hour for all types of work, that all associates' time should be awarded \$60 per hour and that all paraprofessional time be given \$30 per hour. Mr. Reyecraft argued that the future time expected to be expended on settlement administration subsequent to final settlement approval should be billed at a "mixed rate" of \$65 per hour for all time, including that of paraprofessionals and non-legal assistants. (Transcript of Hearing of June 5, 1972 at pp. 80-83.) Similarly, affidavits submitted in the prior proceedings by other Objectors to Appellee's original fee request support the minimum rates found by Judge Metzner. For example, a member of the firm of Botein, Hays, Sklar & Herzberg, based upon his assumption that the settlement itself was unreasonable and should be rejected, argued in an affidavit that in the event the settlement was approved the appropriate "straight time compensation" for "senior attorneys" (Messrs. Berger, Montague and Newberg) should be \$150 per hour and that straight time charges for junior attorneys should be \$60 per hour. Based upon what he deemed an unreasonable recovery and little compensation for contingency, he argued that the above "straight time" charges should be increased by only 50% (A308-315).

36. For example, in *Benerofe v. Barlett*, 70 Civ. 3415 (Memorandum and Order of July 30, 1975, S.D.N.Y. and Exhibit "A" to Affidavit of Lawrence Milberg dated July 15, 1975), Judge Knapp utilized the following base rates in awarding over \$450,000 in fees in

(footnote continued on next page)

As a practical matter, the most important hourly rates at issue herein are those for Messrs. Berger (\$125/hour), Montague (\$100/hour) and Newberg (\$100/hour), who together expended nearly 80% of the attorneys' time involved in this case. Although their brief is somewhat unclear on this point, Appellants are apparently only seriously attacking the use of \$100 per hour for Messrs. Montague and Newberg. In fact, their rates and those of the other attorneys of Appellee are easily supported by the Record in the case, including prior statements of Appellants' own counsel and recent cases which have set

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a securities class action for all time since the commencement of the litigation in 1970:

	Hourly Rate	Year Admitted
Melvyn Weiss	\$125	1960
Lawrence Milberg	\$125	1937
Jared Specthrie	\$100	1965
David Bershad	\$100	1965
Harold Morrow	\$ 75	1966
Paul Tullman	\$ 75	1962

In *Blank v. Talley Industries, Inc.*, 70 Civ. 4144 (S.D.N.Y., Opinion dated Jan. 14, 1975), Judge Weinfeld used flat rates of \$100 per hour for all partners and \$50 per hour for all associates (at p. 10) in determining counsel fees of \$1,395,600 in a securities class action begun in 1970.

In *Doughboy Industries Inc. v. American Cyanamid Co.*, 1975-2 Trade Cases ¶60,452 (D.Minn. 1975), which commenced in 1968, Judge Lord used flat rates of \$100 per hour for partners' time, \$40 per hour for associates' time and \$20 per hour for paraprofessional time for the 16 petitioning sets of counsel. The Court also assigned a *pre-risk hourly rate* to a broadly-defined "settlement negotiation" category of \$200 per hour.

In *Arcenson v. Board of Trade*, 372 F.Supp. 1349 (N.D. Ill. 1974), begun in early 1971, Judge Bauer established basic hourly rates of \$100 per hour and \$125 per hour for the senior antitrust lawyers who accounted for over two-thirds of the attorneys' time expended on the case. The Court adopted rates ranging from \$35 per hour to \$80 per hour for the remaining attorneys. In *Gilman v. Mohawk Data Sciences Corp.*, 71 Civ. 4742 (Memorandum and Order dated May 3, 1976, S.D.N.Y.), Judge Metzner recently found that the proper standard hourly rate for Abraham Pomerantz, an attorney of similar stature to Mr. Berger was \$200 per hour.

fees in litigations conducted during roughly the same period.<sup>37</sup>

Given the nature of Appellee's practice and the fact that expert antitrust firms which charge non-contingent hourly rates also often add bonuses dependent upon results (A902-903, 975-979), there is simply no foolproof method for determining an exact hourly rate applicable to each of Appellee's attorneys. It would be possible to find cases supporting both lower and higher rates than used herein. But the rates found to be appropriate by Judge Metzner are certainly within the range of rates recently used by experienced District Judges in setting fees for antitrust and securities specialists and reflect actual billing practices by experienced antitrust firms. Appellants offered no direct evidence contradicting the findings of Judge Metzner as to the appropriate non-contingent hourly rates customarily charged by antitrust specialists. Appellants' counsel did not even offer evidence as to their own hourly charges for major antitrust litigation. Appellants cannot credibly argue that they have sustained the "heavy burden" of proving Judge Metzner's findings were "clearly erroneous".

Based upon the number of hours expended by each of Appellee's attorneys in each category of activity and the

37. For a comparable period in the *International House of Pancakes Litigation*, *supra*, Judge Collison, as noted, set hourly rates of \$200 per hour for Mr. Berger and \$100 per hour each for Messrs. Montague and Newberg. In the instant actions, Appellee requested the use of only \$125 per hour for Mr. Berger. A number of the attorneys for whom the courts in *Arcenson*, *supra*, and *Doughboy*, *supra*, used standard hourly rates of \$100 per hour were of the approximate levels of experience of Messrs. Montague (admitted in 1964) and Newberg (admitted in 1962) herein. See also *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974). In the *Lindy*, *supra*, remand, Judge Harvey used rates of \$125 for Mr. Berger and only \$70 each for Mr. Montague and Mr. Newberg as Appellants' note. But that litigation was commenced in 1966 rather than 1968 and the bulk of the time Messrs. Newberg and Montague expended in *Lindy*, *supra*, was put in substantially earlier than the time they expended in this litigation as shown in the Record herein (A903). Appellants' unsupported statement in their brief (p. 31) that Appellee admitted it would have charged \$70 per hour for work done in 1974 by Messrs. Montague and Newberg is false.

standard hourly rates found to be applicable to each attorney, the District Court found that the minimum value of the time expended by Appellee's attorneys, prior to any adjustment for risk or quality of work, was as follows:

	<i>Attorney Hours</i>	<i>Minimum Value Based Upon Standard Hourly Rates</i>
(a) Pleadings and motions	32.80	\$ 3,130.00
(b) Discovery	173.00	16,901.00
(c) Court appearances and preparation	282.75	31,600.00
(d) Settlement negotiations	244.50	25,737.50
(e) Settlement procedures	396.75	41,262.50
(f) Settlement administration	1349.60	120,063.50
(g) Fee application	194.25	19,692.50
(h) Briefs and legal research	502.50	50,930.00
(i) Appellate proceedings after Final Judgment	236.75	26,237.50
(j) General	154.85	16,211.25
(k) Fee agreements and interventions	10.00	1,000.00
Total	3577.75	\$352,765.75

**III. Judge Metzner's adjustment of the minimum basic value of Appellee's legal services from \$352,765.75 to \$870,607.00 to reflect the risk of litigation and quality of work was not an abuse of discretion.**

*Grinnell I*, *supra*, held that after the basic non-contingent billing value of the "time and labor spent" by counsel had been determined, "other less objective factors" used in setting counsel fees should be employed to adjust the basic fee. *Grinnell I* reiterated that such factors establish the "parameters that affect the value of legal services and which, therefore, must be considered by a court in evaluating a fee request." 495 F.2d at 470. *Lindy I* attempted to categorize the traditional elements within the two concepts of "risk of litigation" and the "quality of an attorney's work."<sup>38</sup>

38. It stated that the risk element included factors such as the contingent nature of counsel's fee agreements, the facts relevant to probability of success, and the existence of a beneficial gov-

There are no guidelines listing all the conceivable elements included within the concepts of risk of litigation and the quality and results of an attorney's work that immutably establish the appropriate emphasis in every large and complex antitrust class action. Similarly, there are no magical formulas that can allow a lower court to adjust the minimum hourly rate value of Petitioner's work with mathematical precision in every case. As recognized in *Grinnell I* the application of these "other, less objective factors" will vary from case to case and is primarily a matter of discretion for the District Judge who is most familiar with the relevant facts. Adopting slightly different formulations, the various federal courts that have awarded fees in major antitrust class actions subsequent to *Grinnell I* are not only in basic agreement on the factors relevant to adjustment of the basic hourly rate value of the time expended but also have devised rough mathematical guidelines or multiples to reflect the risks, quality and results in such suits.<sup>39</sup>

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ernment criminal action. The latter "quality" element was said to include "... the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." 487 F.2d at 168.

On remand in *Lindy*, the District Court made a single combined adjustment, essentially doubling the "basic hourly rate" value of counsel's time for "risk of litigation" and "quality of work" after analyzing the various relevant factors included in these categories. While affirming the result reached by the District Court in doubling the compensable categories as not constituting an abuse of discretion, the Third Circuit held in *Lindy II*, *supra*, that *henceforth* it would require lower courts to make *separate* adjustments—an instruction not clear from *Lindy I*—to the "basic hourly rate" value of counsel's time for "risk" and "quality" (Slip Op. at p. 22). The majority opinion in *Lindy II* goes on to set further detailed standards to be used by lower courts in examining "risk" and "quality". (Slip Opinion at pp. 22-26.)

39. In some situations, the minimum value of the attorneys' services, as determined solely by the hours expended and standard hourly billing rates, may constitute a large proportion of the total recovery, and thus not allow for any significant increase in valuation, regardless of contingencies and quality of work. Thus, the "percentage of recovery" guidelines that some courts utilized prior to *Lindy I*, *supra*, still set a maximum level for awards.

For example, in *Liebman v. J. W. Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1975), a case involving a cash settlement

(footnote continued on next page)

In accord with *Grinnell I*, the recent cases involving fee awards in complex antitrust class actions establish that the following elements are relevant to adjusting the basic hourly rate value:

- (a) The benefits of a prior decree in a government action;
- (b) The magnitude and complexity of the litigation and the risk of success on the major issues in the case;
- (c) The responsibility undertaken by petitioning counsel in light of collateral lawsuits;
- (d) The financial risks of petitioning counsel in light of fee arrangements with clients;
- (e) The amount recovered;
- (f) The amount that would normally be charged to a victorious plaintiff; and
- (g) The standing of opposing counsel.

As to all of the above elements, the record evidence in this case is very clear and easily supports the results reached by Judge Metzner. On the most important of the above factors—the benefit of the prior government case, the risks involved on the merits, and the significance of the amount recovered—this Court itself had already made detailed findings in affirming Judge Metzner's extensive opinion (A608-617) approving the settlement.<sup>40</sup> Furthermore, the results reached in awarding counsel fees in recent antitrust class action cases, in terms of the similar degree of adjustment to the "basic hourly rate" value involved, confirm that no abuse of discretion occurred herein.

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of \$1,800,000 with a possible "credit" fund of \$500,000, the court added nothing for "contingency, complexity or amount of the recovery" (at pp. 700-701) and stated that the total fees based upon standard hourly rates already amounted to 15% of the combined cash and credit settlement and 19% of the cash fund (at p. 702).

40. For example *Grinnell I* held that, on the basis of sufficient evidence, Judge Metzner correctly analyzed the risks of the litigation and the significance of the recovery. 495 F.2d at 462-63. Appellants have admitted in their brief (p. 19) that the prior findings of this Court in *Grinnell I, supra*, constitute "law of the case".

**A. Judge Metzner's findings supporting the adjustment of Appellee's basic fees were not clearly erroneous.**

**(1) The benefits of a prior governmental proceeding**

This Court has already found that, unlike numerous antitrust class suits following successful government actions, the liability of defendants herein to national classes of subscribers was not *prima facie* established by the prior government civil injunctive action. 495 F.2d at 455-57. To the contrary, as this Court previously held, the national *subscriber* classes were seriously *hindered* by the government case:

"The government's victory was in large part predicated on defendants' predatory *price-cutting* practices which, according to the Court, demonstrated the existence of both monopoly power and an intent to destroy competition. These findings are of dubious value to the class plaintiffs in the present actions. No questions with respect to any injury to *subscribers* were either put in issues or determined in the government action. In fact the basis for the government decree was adverse to the interests of the subscriber-plaintiffs, in so far as these plaintiffs, in order to obtain monetary relief, have to prove that the monopolization resulted in artificially *inflated* prices." 495 F.2d 455-56.<sup>41</sup>

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41. Although Appellants acknowledged the findings in *Grinnell I*, *supra* are "law of the case", they make the extraordinary argument, in the face of this Court's holding that Judge Metzner's subsequent finding that the government case was not beneficial to Appellee (A1168) was "clearly erroneous" (Appellant's Brief, p. 24).

**(2) The risks of successful prosecution in light of the magnitude and complexity of the litigation**

Even in proceedings subsequent to a relevant and beneficial government case, the prosecution of national "consumer" class actions often involve issues of great magnitude and complexity. Yet, the national subscriber class actions herein had far more substantial risks involved in attaining any significant ultimate recovery than in any other major antitrust class actions to which comparison can be made. On all four significant issues facing Appellee in prosecuting these actions—liability, impact, damage and national class certification—there were, as this Court has already found, "... substantial roadblocks stand[ing] in the way of any ultimate victory for plaintiffs on the merits." 495 F.2d at 457. There was a considerable risk that even if the national subscriber class action had been certified and successfully litigated through trial that these plaintiffs would have recovered nothing at all.

The decree in the government action and the evidence adduced therein, as already shown, were at best of no benefit to the subscriber classes and at worst a substantial detriment on all major issues of contention. The defendants intended to relitigate the issue of liability and it would have been difficult to sustain the same relevant service and geographic markets in a national subscriber class action for damages that the Supreme Court upheld in the government suit for injunctive relief. The proper definition of markets would vary from city to city. Defendants' relevant activities varied from city to city. Costs and prices varied from city to city to such an extent that the evidence in the government case showed that ADT deviated from its minimum base rates 99% of the time and that even in 20 cities where defendants had a "monopoly" they were losing money. In view of these facts, this Court has already found that the basic monopolization charge was "... still open to attack" and that defendants in a new trial "... might well carry the day ..." on the liability issues. 495 F.2d at 456.

Proving impact and damages for national subscriber classes was even more difficult, as this Court has already found. The government's case was based on predatory pricing in competitive cities and conduct in monopoly cities designed to deter entry. Thus it was probable that the only persons injured by the defendants' conduct were the competitors who were driven out of business or deterred from expanding their operations. That this most likely occurred in the Grinnell situation is evidenced by the fact that the defendants paid \$12 million to settle the competitor suits before settling a single subscriber action. The Record herein contains an affidavit of David Shapiro, counsel for a group of competitors who had previously settled their suits against defendants for \$6,000,000, stating that based on his analysis of the record in the *Grinnell* proceedings the subscribers suffered no damages at all (A389-390). This Court's own finding describes the problem of proving damages to the majority of subscriber class members:

"Even if the relitigation of the market issues does not succeed in overturning the basic finding of monopolization, it would almost inevitably affect the proof of impact and damages. It appears that the majority of claimants may well be subscribers in 'competitive cities,' i.e., cities where prices were low and alternative services were open to subscribers. Of the more than 14,000 claims, over 8,800 are apparently from competitive cities, representing approximately sixty-two percent of the total transactions reflected in the claims that have been submitted." 495 F.2d at 457.

Finally, this Court has already held that if Appellee had not achieved the settlement subsequently approved that "... there would have been a serious question as to whether these actions could have been maintained as class actions at all." 495 F.2d at 457. This Court approved Judge Metzner's earlier findings concerning the difficulty of sustaining national class certification:

"In its approval of the settlement offer the District Court outlined some of the factors which militate

against the use of the class action device. The separate liability and damage issues present enormous difficulties. There are different competitive climates in each of the locales involved. All the members of a class did not contract for the same services even in the same city. In addition, a substantial administrative burden could have resulted from approval of the class actions urged in this case. The District Court estimated that, at an absolute minimum, the separate liability and damage issues would take at least five years to try. Such necessitous judicial delays and the resulting uncertainty in outcome were all factors which would weigh strongly in any decision to accept a settlement." 495 F.2d at 457.

In addition to these problems, Appellee faced two separate statute of limitations questions. First, there was the statute of limitations issue relating to the end of the tolling period which was fully litigated to the Supreme Court. Second, defendants intended to contest the right of non-litigating class members to rely upon the class suit to avoid the statute of limitations without actual proof by each class member of reliance on the filing of said suit.

Not only were the substantive risks to successful prosecution by national subscriber classes high, but, as Judge Metzner found in evaluating the "risk" element, these issues were "novel and complex".<sup>42</sup> Perhaps the most significant evidence of the risks of attaining any ultimate recovery for these classes is that although over fifty-four other subscriber actions were filed by numerous other experienced antitrust counsel, including counsel for these Appellants, none attempted to represent a subscriber class of any size except for three statewide actions filed subsequent to Appellee's complaints.<sup>43</sup>

42. "Finally, in evaluating the risk factor in this case, we come to the question of whether 'the issues are novel and complex or straightforward and well worn?' 495 F.2d at 471. I would say that the issues here were novel and complex, and again refer to the details set forth in 356 F. Supp. 1380." (A1169).

43. Appellants make an extended argument that there was little risk of not obtaining a substantial recovery in this case because the

(footnote continued on next page)

### (3) The responsibility undertaken by Appellee

This litigation is a unique example of a major antitrust class action in which a *single* law firm successfully represented national classes. Although in this, as in all multi-district litigation, various counsel shared some of the ongoing work required on behalf of all plaintiffs, no other firm was willing to assume the responsibility for representing national classes. As already recognized by this Court, this was not a responsibility easily and quickly discharged:

"The settlement in the case at hand was not negotiated in the early stages of the dispute. . . . No other representative surfaced until *after* the settlement agreement was reached and widely publicized. Thus, this is not a situation, such as that involved in *Ace Heating & Plumbing Co., Inc. v. Crane Co., supra*, where several different counsel were vying for recognition as class representatives. . . ." 495 F.2d at 465.

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probability of settlement was high. This argument is primarily grounded on the contention, already rejected by this Court, that the prior government case assured some recovery for subscribers. Ignoring the facts already found by this Court, Appellants argue the "probability of settlement" theory based upon findings in other cases (e.g., *Liebman, supra*) and dissenting opinions (e.g., *Lindy II, supra*). Their final argument, based upon a quote of another lawyer taken out of context, is essentially that all antitrust class actions are settled for large amounts of money. This argument is nonsense. As the Record shows, Appellee and others have expended substantial amounts of time in major antitrust class action litigation where no recovery was obtained (A904-905).

Indeed, very few *national* class actions encompassing virtually all customers of an affected product have ever been certified by lower courts. In fact, most suits filed as class actions under the antitrust laws are not certified at all or certified as requested. A review of the 1975 CCH Trade Cases volumes reveals that of the 30 cases in which the issue of class certification was before a District Court, *no* class of any size was allowed in 13 cases and a more limited class than requested was certified in 10 of the remaining cases. In the four cases where denial of class action certification was reviewed by a Court of Appeals, the denial was affirmed.

#### **(4) The financial risks to Appellee in prosecuting these actions**

All of Appellee's fee contracts with clients in these cases are purely contingent contracts. Although Appellee began this litigation over eight years ago, secured a \$10 million plus interest settlement over five years ago, and obtained final approval of the settlement nearly three years ago in this Court, it has not received any fees for its services from any client or from any Court. It has incurred substantial litigation costs for over eight years, for which it has still not been reimbursed. For a firm the size of Appellee, which engages primarily in contingency work, the financial risks and delays herein have been significant. Plaintiffs' antitrust firms, such as Appellee, expend major amounts of time in other cases which they often lose, and for which they receive, unlike counsel billing hourly rates, no compensation (A904-905). In determining adjustments for "risk" in successful litigation, this fact must be taken into account if the Courts wish to encourage strong private enforcement of the antitrust laws by experienced members of the bar.

#### **(5) The significance of the amount recovered**

As of October 23, 1975, the total settlement fund herein, with accrued interest, amounted to approximately \$12,-200,000. Given the facts in this case, that settlement is extraordinary both in itself and when compared to settlements in other major antitrust class actions.

Appellee did not have the relative luxury of prosecuting a price-fixing case following a government suit. In such a case, proof of liability is far easier than in a monopolization case and the existence of some damages follows from the proof of liability. Furthermore, obtaining class certification for a large class is far more certain and once such a class is certified the possibility of eventual settlement increases. Here, even assuming Appellee could fully and successfully overcome both statute of limitations issues, establish workable market definitions,

get three national classes certified, and prove liability, there would still have been a strong chance of no recovery. For the nearly 60% of claimants who were in cities where predatory pricing had taken place, as well as for claimants who were in monopoly cities where defendants were losing money, the possibility of proving damages was minimal. In the light of that situation, the recovery was exceptional.<sup>44</sup>

One indication of the value of that recovery is the testimony offered by the economic expert of the claimants who appealed the settlement judgment. The expert estimated an optimum recovery after a fully successful trial of 3% to 7% of total billings. In the face of the risks discussed above, Appellee negotiated a settlement constituting approximately 3½% of billings of claimants over an 11¼ year period, or approximately 10% of billings against the normal four-year settlement period. This Court has already found that this settlement "... was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." 495 F.2d at 458.

Another indication of the outstanding nature of the settlement is that it compared favorably with settlements in several recent price-fixing class actions in which proof of all important issues was simpler. The recovery herein of approximately 10% of approved purchases over a four-year period is clearly in the range of the corresponding figures of 4.0% (for a 3-year period) in *Dorey Corp. v. E. I. duPont de Nemours & Co.*, 1975-2 Trade Cases ¶60,576 (S.D.N.Y. 1975); 7.1% in *City of Philadelphia v. Interpace Corp.*, (E.D. Pa. C.A. 43,008; and 9.2% in *School District of Philadelphia v. Harper & Row Publishers, Inc.* (N.D. Ill. C.A.

44. Appellants' attempts to attack the value of the national class settlements, in the face of this Court's previous findings are, at best, specious. Appellants' sole "evidence" consists of a chart listing higher settlement offers on a percentage basis (but a fraction of the total dollar recovery to the classes) made by defendants subsequent to final approval of the class actions to settle a few remaining individual claims where other counsel still had to be compensated by their clients. Judge Metzner explicitly disposed of this contention in his opinion (A1168-1169).

68 C 2144). In *Doughboy, supra*, the \$35,000,000 settlement constituted approximately 7.9% of the \$444,000,000 in approved purchases.

More pertinent yet is a comparison of the recovery in the instant case as a percentage of total billings of the defendants during the four-year period against comparable figures for the major price-fixing class suits. In the instant cases, there were approximately \$260 million in billings during a four-year period, so the \$10 million settlement constituted approximately 4% of total sales. In *Lindy, supra*, the plumbing fixtures case, total sales during a four-year period were approximately \$1 billion, and the settlement constituted slightly over 2% of that amount. In *Anaconda American, supra*, the brass mill products case, there were approximately \$2 billion in total sales in the four-year period, and the corresponding settlement approximated slightly over 1% of such sales. In *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971), the gasoline price fixing case, the government indictment alleged yearly sales by the defendants of \$720 million. The settlement of \$29 million thus constituted approximately 1% of total sales over four years. In comparison, the result here, where most subscribers probably suffered no damages, is outstanding. The settlement is even more extraordinary when it is considered that the same defendants had already paid out \$12 million, or approximately 4½% of total billings, to competitors.<sup>45</sup>

**(6) The amount that would normally be charged to a victorious plaintiff**

The total fee awarded by Judge Metzner constitutes less than 9% of the initial settlement and only about 7% of the fund plus accumulated interest. Viewed in relation to the amounts that experienced antitrust counsel would

45. The settlement is also outstanding in view of the time period and the scope of the classes involved. The classes are so broadly defined that the only parties excluded were governmental entities above the state level, individual homeowners and the three state classes. Although most antitrust class actions have been settled for a four-year period or less, the present settlement covers all members of the classes for an 11¼ year period.

normally charge for a \$12.2 million recovery in a highly risky case litigated on a purely contingent basis, this fee is modest.

As shown by the record herein and the facts within both the District Court's and this Court's own knowledge, fees in antitrust actions litigated on a contingency basis are normally contracted for, and charged at, approximately 20% to 40% of recovery.<sup>46</sup> This reflects the evidence as to Appellee's fee arrangements herein, and in *Lindy, supra*, as well as the experience in *Philadelphia Electric Co. v. Anaconda, supra*, where after the negotiation of the settlement virtually all class claimants entered into fee contracts with Appellee and his co-counsel agreeing to pay fees of 25% of their respective recoveries (at p. 559). In *Alpine Pharmacy, supra*, this Court, held that an award of nearly \$2.0 million was not excessive in relation to either the total \$12.5 million recovery or the \$9.5 million "interest" segment of that total fund and that such an award was well within the range of fees awarded in antitrust actions undertaken on a contingent fee basis. 481 F.2d at 1052-53.

#### **(7) The standing of opposing counsel**

There has been no dispute herein that the standing of counsel opposing Appellee was very high. All defendants were represented by experienced and well-known antitrust firms that had been litigating these matters since the

46. See *Arcenson, supra* at p. 1357. In *Norte & Company v. Huffines*, 62 Civ. 3390 (S.D.N.Y. 1970) (Transcript of Hearing of Oct. 16, 1970), then District Judge Mansfield, in awarding counsel fees of \$1.0 million from a \$4.2 million fund created in a derivative action, noted that the resultant percentage fee of 24% was what would be "... normally expected at the conclusion of a contingency suit that has been successful." (at p. 8). In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 248, 304-305 (M.D. Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), *aff'd in part and rev'd in part*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the District Court noted that the actual fee agreement between plaintiff and its counsel (the Donovan, Leisure firm) provided for the payment of ongoing hourly rate charges with a contingent fee of 20% of the final recovery. See also *Farmington Dowel Products Co. v. Forster Manufacturing Co., Inc.*, 421 F.2d 61 (1st Cir. 1969) and 436 F.2d 699 (1st Cir. 1970).

commencement of the government suit in 1961. They had shown their willingness to fully litigate every significant issue in the case, even through the Supreme Court.

***B. The adjustments to Appellee's basic fee made by Judge Metzner are well within the range of adjustments made recently in comparable cases.***

The decisions awarding counsel fees in major antitrust class actions subsequent to *Grinnell I* support Judge Metzner's decision to adjust Appellee's basic hourly rate value of the legal services performed by a factor of less than 2.5.<sup>47</sup>

47. Judge Metzner very carefully made different degrees of adjustment to different categories of legal activity (A780-790, 881-884). On the main categories of "substantive activity" the District Court found that the "risk of litigation", the complexity of the issues, the competence shown by Appellee in the litigation, and the success achieved merited multiplication by a factor of 3.0.

Hours spent on settlement administration by attorneys were compensated at twice the basic rate. In this litigation less than 20% of the over 6500 hours spent on settlement administration were attributable to attorneys (A971-972); the remainder were expended by paraprofessionals (for which services Appellee is being reimbursed at "cost", or \$9.00 per hour). The Record is clear that the services of attorneys on administration matters involved preparation for court appearances, handling of challenged claims, determination of administration policies and other decision-making matters (A786-790, 882). The Record belies Appellants' argument (pp. 33, et seq.) that the award overcompensates Appellee for extraordinary amounts of "mechanical" work. The mechanical work was done by the paraprofessionals (A786-787, A882-883). Furthermore, unlike other class actions, where no settlement challenges were made, such attorneys' time was primarily performed *prior* to approval of this settlement not only by this Court, but by the District Court in December, 1972 (A880). Judge Metzner's *overall* adjustment is certainly not an abuse of discretion in light of the awards made by other courts for adjusting "settlement administration" time by both attorneys and paraprofessionals. *Lindy II*, *supra*, affirmed the doubling of settlement administration time *therein* where no challenge to the settlement had been made.

Judge Metzner awarded straight hourly rates for the time spent on the fee application itself. The "fee application" time herein included only the time spent by Appellee and not any time spent by Appellee's counsel.

As already noted, the final adjusted "mixed rate" is approximately \$243 per hour.

In *Arenson, supra*, Judge Bauer awarded fees to eight law firms at *four times* the hourly rate of *all lawyers* representing all plaintiffs for *all time* expended on all types of legal activity. The total fees awarded amounted to \$1,339,060 reflecting an average mixed rate award of over \$386 per hour for each of the 3734.5 hours expended by attorneys since commencement of the litigation in 1970. Judge Bauer noted that awards resulting in hourly rates of \$400-\$500 per hour had been awarded in other recent antitrust class actions conducted on a contingency basis, and that such awards reflected reasonable adjustments of hourly rates for contingency.

In *Doughboy, supra*, which involved a \$38,100,000 settlement of the agricultural class actions in the antibiotics multidistrict litigation, the Court awarded, following *Grinnell I*, a total of \$10,094,017 to 16 firms from the distribution to be made to claimants that did not have fee contracts with counsel. The Court used various risk multiples for petitioning firms *other than lead counsel* for various categories of work for all hours expended.<sup>48</sup> To *lead counsel* Judge Lord assigned a basic hourly rate of \$100 per hour for all 15,191.25 hours and awarded an across-the-board risk multiple of 3.0 to *all time expended* on all activities since the beginning of the litigation in 1968. Paraprofessional time was compensated for at rates up to \$50 per hour.

Fee awards in *Gypsum, supra*, were made to twenty-eight sets of petitioning counsel (representing various classes and class claimants) who shared responsibility for conduct of the litigation over seven years. The fees awarded totaled \$9,262,559 against an initial settlement fund of \$67 million.

In setting fees for the five non-lead counsel firms representing class representatives or acting as liaison coun-

48. The multiples ranged from 1 to 2.5, except for "settlement negotiation" time (Category E) where an effective multiple of 4.0 was used since Judge Lord set a basic hourly rate of \$200 per hour for all such time of senior attorneys and then multiplied by a risk factor of 2. This category included not only preparation for and actual negotiations, *but all time seeking settlement approval.*

sel, the Court applied, in each instance, a different single multiple to all the hours expended by attorneys *and* *para-professionals* regardless of category of activity. These multiples ranged from 1.75 for two firms to 2.2 for one firm. In making an award to the *lead counsel* firm for the classes, the Court multiplied all hourly rates for both attorneys *and* *paralegals* (at a base rate of \$15 per hour) by an *across-the-board* multiple of 3.0 for all time expended on all categories of activity, including settlement administration, from commencement of the litigation in 1967 up until the final filing of the fee petition, *including time expended after final approval of the settlement*. Thus, for a total of 14,780 attorneys' hours and 2,893 paraprofessional hours expended through the filing of its fee petition, lead counsel's total fees were set at \$3,988,635, or a mixed rate of approximately \$270 per hour (based solely on attorneys' time).

On the remand, in *Lindy, supra*, Judge Harvey awarded \$1,134,765.45 based on 6294.5 hours of attorneys' time expended by co-lead counsel up to the initial fee petition filing on the remand. Petitioners had negotiated class settlements following a *criminal* conviction for price-fixing. In the circumstances therein, Judge Harvey *doubled* the award for *all* categories of time, including settlement administration, already expended by attorneys through March 30, 1974, the cut-off date on the fee petition filing, except for fee application time which was awarded at regular hourly rates. The Court also awarded \$20 per hour on all paraprofessional time. The majority in *Lindy II, supra*, affirmed *en banc* the District Court's doubling of all categories of time therein as a reasonable exercise of discretion, but reversed the granting of any award for time spent on litigating the fee issue itself.<sup>49</sup>

49. In *Lindy II, supra*, the Third Circuit held that "... in the circumstances of [that] case ..." it would not allow an award for time expended by counsel in connection with obtaining its own fees. That decision conflicts with the policy enunciated in *Perkins v. Standard Oil Co. of California*, 399 U.S. 222 (1970), where the Supreme Court held that time spent on litigating a counsel fee award under §4 of the Clayton Act was itself to be part of the award.

Other courts have compensated class counsel for time spent in connection with fee applications under the equitable fund doctrine.

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It would be possible, of course, to draw detailed comparisons and distinctions between the facts relevant to risk and quality in the above cases and those in the instant case—just as one could draw some distinctions and comparisons amongst the four cases themselves. Similarly, there are numerous decisions on fees in antitrust cases, securities cases and other types of cases, involving class actions and non-class actions, both before and after *Grinnell I*, which could lend support to arguments to either raise

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*In re Gypsum, supra; Doughboy, supra.* Given the fact that this Court has mandated that attorneys are required to now expend significant amounts of time in presenting the data required for awarding fees, some minimum level of cost in this regard should be assessed against the class fund. Such time expended by counsel is part of the cost of creating the fund just as under §4 awards where, as held in *Perkins, supra*, fee litigation time is part of the reimbursement properly due counsel for creating the result. Even *Lindy II* stated it was not deciding whether the class representative-clients of class counsel could request from the class reimbursement for the costs of counsel's time in obtaining the fee (Slip Opinion at p. 10).

If this Court decides to follow what appears to be the new Third Circuit rule, it is requested that the Court correct an apparently inadvertent error by Judge Metzner in splitting in half the category designated by Appellee's papers as "Appellate Proceedings After Final Judgment" involving 236.75 hours and \$26,237.50 of basic time as found by the lower court, and applying one-half of the same to the category of "Fee Application" subject to no multiple adjustment and the other half to substantive time subject to an adjustment by a multiple factor of 3.0 under the Court's opinion. Judge Metzner's opinion relies upon the fact that the original appellate proceedings involved both work on the fee appeal and the settlement appeal by Appellee. But the affidavit filed by Mr. Montague makes clear (A883), and there is no contradictory evidence, that *all* of Appellee's time spent on the first fee appeal was included in the "Fee Application" category and that *all* the time in the "Appellate Proceedings" category only included time spent on preparing the separate brief on appeal of the approval of the settlement and preparing for and making the argument on the settlement in this Court. All the work done on the first fee appeal was undertaken by Appellee's counsel; none of the time expended by Appellee's counsel was included within the hours claimed in the fee petition. Because of this inadvertent error, even if "fee application" time is not to be compensated and the award of \$32,811.00 under Judge Metzner's formula for "fee" time struck, the \$13,118.75 for 118.375 hours of "Appellate Proceedings" time inadvertently shifted into the "Fee Application" category by Judge Metzner should be allowed, and then multiplied by a factor of 3.0 in accord with the rest of Judge Metzner's opinion.

or lower the adjustment made by Judge Metzner.<sup>50</sup> But as a practical matter the adjustments made by the experienced trial judges in the above actions, which are the most recent antitrust class action cases comparable in magnitude and complexity to the class actions herein, clearly establish that Judge Metzner did not "abuse his discretion" in making a final award of \$870,607.

Appellee recognizes that perfunctory percentage awards of counsel fees by some District Courts prior to *Grinnell I*, *supra*, had led to abuses that required a more detailed consideration of the non-contingent billing value of the time actually expended by counsel. But the imposition of guidelines for an award of counsel fees should not require, as *Lindy II*, *supra*, recognizes, that a fee award proceeding itself become a major litigation or a vehicle to discourage meaningful private enforcement of the antitrust laws.

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50. For example, in *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (C.D. Calif. 1975), involving an award under §4 of the Clayton Act for a recovery of \$32,712,081 in a non-class action antitrust case, a District Court recently awarded total fees of \$3,200,000 based upon an estimated time expenditure of 7462-8000 hours by seven attorneys on the case—or over \$400 per hour as an adjusted "mixed rate". In *Goldstein v. Alodex Corp.*, Civ. No. 71-1857 (Memorandum dated Dec. 7, 1973, E.D. Pa.), Judge Broderick, applying *Lindy I*, *supra*, awarded counsel fees of \$800,000 out of a \$4.0 million settlement fund in a securities class action based upon 1,061.75 hours of attorneys' time already expended and an estimated 500 hours of time not supported by time records (or over \$500 per hour). Similarly supporting the final award herein, Judge Lasker awarded counsel fees after *Grinnell I*, *supra*, of \$170,000 out a \$850,000 fund in a securities class action begun in 1969 based upon 702 hours of attorneys' time (or approximately \$242 per hour) in *McCausland v. Shareholders Management Co.*, 69 Civ. 5454 (Memorandum dated May 9, 1974, S.D. N.Y.). In *Quirke v. Chessie Corp.*, 368 F.Supp. 558 (S.D.N.Y. 1974), then District Judge Gurfein awarded a counsel fee of \$440,000 based upon an expenditure of 1989.25 attorneys' hours (or over \$221 per hour) in a securities class action with a recovery valued at \$2,444,109.

# Conclusion

For the foregoing reasons, the Final Judgment of the District Court entered April 27, 1976 awarding counsel fees of \$870,607.00 to Appellee should be affirmed.

Respectfully submitted,

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## **ADDENDUM**

**CITY OF DETROIT et al., Plaintiffs-Appellees,**

**v.**

**GRINNELL CORPORATION et al., Defendants-Appellees.**

**MANHATTAN-WARD, INCORPORATED, et al., Plaintiffs-Appellees,**

**v.**

**GRINNELL CORPORATION et al., Defendants-Appellees.**

**1225 VINE STREET BUILDING, INC., et al., Plaintiffs-Appellees,**

**v.**

**GRINNELL CORPORATION et al., Defendants-Appellees.**

**Nos. 14, 18, Dockets 73-1211, 73-1420.**

**United States Court of Appeals,  
Second Circuit.**

**Argued Oct. 29, 1973.**

**Decided March 13, 1974.**

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Harvey S. Kronfeld, Philadelphia (Mesirov, Gelman, Jaffe & Levin and Anthony E. Creato, Philadelphia, Pa., of counsel), for appellants Aldon Industries, Incorporated and 19 other objectors.

William Simon, Washington, D.C. (Howrey, Simon, Baker & Murchison and G. Joseph King, Washington, D.C., of counsel), for appellants Bay Fair Shopping Center, and others, claimants.

David Berger, Philadelphia, Pa. (David Berger, P.A. and H. Laddie Montague, Jr., Philadelphia, Pa., of counsel), for appellees City of Detroit, Manhattan-Ward, Inc., 1225 Vine Street Building, Inc., Class Representatives.

Gordon B. Spivak, New York City (Lord, Day & Lord, Herbert Brownell, Thomas D. Brislen, New York City, David Berger, P.A., Philadelphia, Pa., David Berger, and H. Laddie Montague, Jr., Philadelphia, Pa., of counsel), for appellees David Berger and David Berger, P.A., Counsel for Class Representatives.



Denis McInerney, New York City (Cahill, Gordon & Reindel, Thomas Curran and Allen S. Joslyn, New York City, of counsel), for appellee Grinnell Corp.; (White & Case, MacDonald Flinn, Thomas McGanney, Mario Diaz-Cruz III, New York City, of counsel), for appellee American District Telegraph Company; (Kelley, Drye, Warren, Clark, Carr & Ellis and Bud G. Holman, New York City of counsel), for appellee Holmes Electric Protective Company; (Olwine, Connelly, Chase, O'Donnell & Weyher, William F. Sondericker, and Joseph M. Burke, New York City, of counsel), for appellee Automatic Fire Alarm Co.

Barry Brett, New York City (Parker, Chapin & Flattau, Alvin M. Stein, Weil, Gotshal & Manges, A. Paul Victor, Freda F. Bein, Liebman, Eulau, Robinson & Perlman, Herbert Robinson, New York City, of counsel), for appellees pro se.

Before MOORE and HAYS, Circuit Judges, and BRYAN, District Judge.\*

#### MOORE, Circuit Judge:

This is an appeal from the District Court's approval of a proposed settlement, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of three consolidated private antitrust national class actions brought in October, 1968, by commercial, industrial and governmental subscribers of "central station protection services" against four defendant corporations to recover treble damages plus attorneys' fees and costs under Section 4 of the Clayton Act. 15 U.S.C. § 15 (1970). The approved settlement, filed on December 27, 1972, calls for payment by the four defendants of \$10 million to the three classes of plaintiffs and, in addition, grants a fee award of \$1.5 million to counsel for the class representatives. The District Court retained jurisdiction over the case for the purposes of determining whether four other petitioning firms were entitled to share in this fee. The first group of appellants, consisting of members of the represented classes, attacks the settle-

ment on the ground that it is so small as to be grossly unfair on its face. They also object to the manner in which the District Court approved the settlement. A second group of appellants, also members of the represented classes, seeks to overturn the fee award and to prohibit any outside attorneys from sharing in whatever award might ultimately be made.

Although all considerations point to the fact that the \$10 million dollar settlement is fair and equitable, those same considerations do not justify such a large counsel fee award. Consequently, we affirm the District Court's approval of the settlement and reverse and remand for a hearing as to the fee award. We do not yet have the jurisdiction necessary to decide whether anyone other than counsel for the class representatives ought to share in any fee which might ultimately be awarded.

#### THE FACTS

Defendants American District Telegraph Company (ADT), Grinnell Corporation (Grinnell), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company (AFA) are in the business of providing "central station protection services" against the hazards of loss by burglary or fire. Alarm systems are installed on the premises of their customers, and protection services are furnished under subscriber contracts. "Central stations" are maintained in various cities throughout the country where the alarm devices on the protected premises are monitored.

The class actions in issue developed out of a civil injunctive action brought by the United States against the defendants. On November 27, 1964, Judge Wyzanski filed an opinion finding violations of Sections 1 and 2 of the Sherman Act. *United States v. Grinnell Corporation*, 236 F.Supp. 244 (D.R.I.1964). On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the Dis-

\* Of the Southern District of New York, sitting by designation.

trict Court in part, reversed in part, and remanded for further hearings on relief. *United States v. Grinnell Corporation*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). After more than a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from awarding generalized injunctive relief, including a prohibition against predatory pricing "at unreasonably low charges," the final decree directed varying amounts of divestiture of the assets by American District Telegraph Company in twenty-one of the one hundred and fifteen cities served by ADT, and directed other relief relating to the offering of contracts by ADT to competitors in five cities.

Thereafter two treble damage actions were brought in the United States District Court for the Eastern District of Pennsylvania by competitors of the defendants, *Robinson Electric Protective Corporation v. Grinnell Corporation*, Civ. No. 27961 and *Sentinel Alarm Corporation v. Grinnell Corporation*, Civ. No. 36061. The theory of these cases was that the defendants, beginning in 1958, had attempted to drive them out of business by predatory pricing. After extensive discovery covering pricing practices, the defendants settled the cases prior to trial. A series of suits instituted by both competitors and subscribers of the alarm company defendants followed. Suits were filed by over forty-eight competitors alleging predatory pricing practices in over thirty cities throughout the United States. In addition to the three national class actions *sub judice*, over fifty-four other individual subscriber actions were filed by other counsel.

In July, 1968, these three national class actions were commenced in the United States District Court for the Eastern District of Pennsylvania for all governmental, commercial and industrial subscribers of the defendants. The breadth of these classes is such that the only subscribers not covered are home-

owners, federal governmental agencies, and governmental entities in three states<sup>1</sup> which are represented in separate statewide class actions.

On October 3, 1968, the national class actions, along with all but one other pending competitor case, were transferred, pursuant to 28 U.S.C. § 1407, to the United States District Court for the Southern District of New York for consolidation and coordination for pre-trial purposes.

At the time this settlement agreement was executed, on August 27, 1971, the national class actions had been pending for more than three years. Discovery by interrogatories and requests for production of documents had been substantially completed. All preliminary motions were filed, briefed, argued and resolved by judicial decision. As a result of the ruling on defendants' partial summary judgment motion, sub nom. *Russ Toggs Inc. v. Grinnell Corporation*, 304 F.Supp. 279 (S.D.N.Y.1969), *aff'd* 426 F.2d 850 (2d Cir.), cert. denied, 400 U.S. 878, 91 S.Ct. 119, 27 L.Ed.2d 115 (1970), the three national class actions were held to have been timely filed. However, the rulings clearly established that with respect to any unfilled cases, the statute of limitations expired in September, 1968. A determination of the validity of the class action device, earlier stayed until defendants' motion for partial summary judgment had been adjudicated, was briefed and supported by affidavits and a hearing was held before the District Court on June 18, 1971. It was after the class action hearing that settlement negotiations between class counsel and counsel for defendants became serious. As a result, the District Court was asked to withhold any class action determination until after the settlement negotiations had been exhausted. Thereafter, settlement negotiations resulted in the settlement agreement dated August 27, 1971.

The Settlement Agreement on behalf of these three national class actions pro-

1. Connecticut, Maryland and New Jersey.

vided for the creation of a settlement fund in the amount of \$10 million payable to the classes over a five year period, with interest. The period for includable transactions on which the allocation of the settlement fund is based is the period from April 13, 1957 (four years prior to the institution of the government case) to July 11, 1968 (the day after the actions were filed and one year after entry of the final decree in the government case). Notice was mailed at defendants' expense to 89,000 of their known customers and was also published for three consecutive weeks in all editions of the *Wall Street Journal* and the *New York Times*. Fourteen thousand one hundred fifty-six claimants filed claims. One hundred eighty-four attorneys and firms filed notices of appearance on behalf of the claimants and were served with defendants' papers in support of the settlement. A number of the plaintiffs in the individual subscriber nonclass actions decided to participate in the settlement as well.

After receiving documents from counsel for class representatives and counsel for defendants in support of the proposed settlement, and all claimants having an opportunity to file objections and papers in support thereof, the District Court held hearings on May 24 and 25, 1972, so that it might rule on the propriety of the settlement agreement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and might award fair and adequate attorneys' fees to those who had represented the interests of the classes. On December 27, 1972, the District Court approved the settlement agreement and awarded, out of the settlement fund, \$1.5 million plus \$14,918.73 out-of-pocket expenses, to counsel for the class representatives, David Berger, Esq. and David Berger, P.A. The Court determined that further hearings would be necessary before it could decide whether other attorneys should share in the fee award.

Under the proposed settlement and the final judgment approving it, the treble

damage claims of the classes are dismissed with prejudice.

#### THE SETTLEMENT

These appellants, members of the classes which received the \$10 million settlement, claim both that the settlement was inequitable on its face and that many of the principles applied by the District Court in approving the settlement were erroneous and mandate reversal. Appellants make four specific contentions. First, they allege that the settlement fund amounts to such a small fraction of the amount which might have been recovered if complete victory had been attained at trial that the law demanded its rejection by the District Court. Second, appellants submit that the District Court committed reversible error when it refused to permit an evidentiary hearing to investigate the propriety of the settlement. Third, they argue that it was error for the District Court to approve of the class action solely for the purpose of settlement while reserving approval of the class action for all other purposes. Finally, appellants urge that the District Court was persuaded in its decision to approve the settlement by considerations, such as the impecuniousness of the defendants and the inconvenience that might be visited upon the Court in the event that the settlement was rejected, which were both irrelevant to the legal issues and improperly entertained. We find no merit in any of these positions.

As we evaluate the settlement approved in this case, this Court must remain mindful that:

Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co., Inc. v. Crane Company, 453 F.2d 30, 34 (3d Cir. 1971).

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In fact, so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion. *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972); *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y.1970), *aff'd* 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

## I.

The first claim set forth by appellants is that the \$10 million settlement was inadequate as a matter of law. They allege that the settlement amounts, at most, to only twelve percent of what the District Court found was the potential recovery for the settlement period and that such a proposed settlement is grossly unfair on its face when liability has been *prima facie* established.

The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.<sup>2</sup>

The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *West Virginia v. Chas. Pfizer & Co.*, 40 F.2d at 1085. *See also* *Protective Committee v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1

(1968); *Newman v. Stein*, *supra*; *Upson v. Otis*, 155 F.2d 606 (2d Cir. 1946); *Percodani v. Riker-Maxson Corporation*, *supra* note 2; *Norman v. McKee*, 290 F.Supp. 29 (N.D.Cal.1968), *aff'd* 431 F.2d 769 (9th Cir. 1970). If the settlement offer was grossly inadequate, as appellants contend, it can be inadequate only in light of the strength of the case presented by the plaintiffs. Naturally, they describe their offensive posture in glowing terms, sparing no superlatives, while the defendants show a similar lack of restraint in demeaning the value of plaintiffs' cause of action. Nevertheless, the only truly objective measurement of the strength of plaintiffs' case is found by asking: "Was defendants' liability *prima facie* established by the government's successful action?" Whenever such liability has been *prima facie* established, any party wishing to justify a settlement offer that amounted to only a small fraction of the ultimate possible recovery would appear to have a very substantial burden of proof. The instant case, however, does not fall into this category.

Section 5(a) of the Clayton Act enables the decree in a successful government action to be used as *prima facie* evidence of the defendant's violation of the law that is established in that action. The decree which resulted from the government's *Grinnell* victory, however, has very little to do with the instant class actions. The government's victory was in large part predicated on defendants' predatory price cutting practices which, according to the Court, demonstrated the existence of both monopoly power and an intent to destroy competition. These findings are of dubious value to the class plaintiffs in the

2. In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery. Any reading of Judge Friendly's opinion in *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), or of the District Court's opinion in *Percodani v. Riker-Maxson Corporation*, 50 F.R.D. 473 (S.D.N.Y.1970), *aff'd sub nom. Farber v. Riker-Maxson Cor-*

*poration*, 442 F.2d 457 (2d Cir. 1971), which seems inconsistent with this principle misreads those opinions.

It might be pointed out that the settlement agreement approved in *Sunrise Toyota v. Toyota Motor Company, Ltd.*, 1973-1 Trade Cases ¶ 74,398, at 93,821 (S.D.N.Y.1973), did not provide for the payment of any money to the class members.

present actions. No questions with respect to any injury to subscribers were either put in issue or determined in the government action. In fact the basis for the government decree was probably adverse to the interests of these subscriber-plaintiffs,<sup>3</sup> insofar as these plaintiffs, in order to obtain monetary relief, have to prove that the monopolization resulted in artificially inflated prices.

Appellants attempt to rebut these facts by introducing the "O'Brien Memorandum", a document written by the Sales Manager of defendant ADT to his immediate superior, which complains of the high prices which that defendant was charging its subscribers. See Appendix Vol. I, at 447G. In addition, they argue that it taxes credulity for defendants to assert that they might conspire against competitors over a prolonged period of time without a desire to benefit financially by overcharging subscribers. Predatory pricing may be a road to monopoly power; the end of monopoly power may be a hoped-for monopoly profit, an end which can only be finally achieved through illegally inflated prices. These arguments represent a shift in ground on the part of appellants. They demonstrate that at its core their case is based not on the decision in the government suit, but rather on the contents of a single document and a logical deduction.

Since defendants' liability was not *prima facie* established it becomes necessary to consider the strength of the case presented by the class members in order to determine whether there is any

basis for appellants' claim that the settlement was grossly unfair and inadequate. It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, "the [trial] judge does not try out or attempt to decide the merits of the controversy," *West Virginia v. Chas. Pfizer & Co.*, *supra*, 314 F. Supp., at 741, and the appellate court "need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues . . . ." *West Virginia v. Chas. Pfizer & Co.*, *supra*, 440 F.2d, at 1085-1086.

The government in its case indeed proved that defendants were guilty of illegal monopolization. This finding, however, is not *prima facie* proof of defendants' liability to their subscribers. Moreover, even the basic question of monopolization, although *prima facie* established, is still open to attack. The determination in the government action does not estop defendants from relitigating the question. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951). They might well carry the day in any new airing of that issue. Three Justices of the United States Supreme Court dissented to a portion of that Court's opinion because they felt that the government's proof of monopolization was based on an unfair definition of the relevant geographic and product-line markets.<sup>4</sup> In

3. Originally, both competitors and subscribers had joined together after the government action in an attempt to coordinate their private actions against the alarm company defendants. Eventually, competitor and subscriber plaintiffs stopped coordinating discovery because the interests of the two groups relating to the proof of impact and damages rested upon diametrically opposed theories.

4. The defendants were found guilty of monopolizing a national market for accredited

central station services. They argue that no matter how their services are defined, they did not compete in a single national market but rather competed in a series of local markets so that, at least for the purposes of evaluating impact, defendants' conduct must be judged in terms of the conditions and activities in each of the areas. Defendants also contend that non-interchangeable services, such as burglar and fire alarms, should not have been lumped together as part of a single market. Moreover, defendants object to the failure to take account of other types

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its opinion approving the settlement offer this District Court found these market issues, and consequently the whole monopolization question, very much alive. *Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1388 (S.D.N.Y.1972).

Even if the relitigation of the market issues does not succeed in overturning the basic finding of monopolization, it would almost inevitably affect the proof of impact and damages. It appears that the majority of claimants may well be subscribers in "competitive cities", i. e., cities where prices were low and alternative services were open to subscribers. Of the more than 14,000 claims, over 8,800 are apparently from competitive cities, representing approximately sixty-two percent of the total transactions reflected in the claims that have been submitted.

Finally, the record shows that if the proceedings had continued and had not been stopped short by the settlement offer, there would have been a serious question as to whether these actions could have been maintained as class actions at all. In its approval of the settlement offer the District Court outlined some of the factors which militate against the use of the class action device. The separate liability and damage issues present enormous difficulties. There are different competitive climates in each of the locales involved. All the members of a class did not contract for the same services even in the same city. In addition, a substantial administrative burden could have resulted from approval of the class actions urged in this case.

of alarm systems, such as direct collection services, local alarms, telephone answering services, and unaccredited central station protection services, in determining the existence of competition.

The dissenting members of the Supreme Court agree with defendants that the majority's attempt to define the geographic market as "the nation" without any consideration for the variances in competition from city to city and its insistence that the relevant product market was restricted to accredited central station protection services "dramatically demonstrates that its [the majority's] action has been Procrustean—that

The District Court estimated that, at an absolute minimum, the separate liability and damage issues would take at least five years to try. Such necessitous judicial delays and the resulting uncertainty in outcome were all factors which would weigh strongly in any decision to accept a settlement.

The class action issues were thoroughly briefed, argued and orally presented to the District Court. They were *sub judice* when the settlement now before this Court was negotiated and reached. If the agreement is overturned, it then will become necessary for the District Court to decide the issue, since defendants reserved their rights to attack the class action anew.

The objectors dispute each of these points vigorously, but the fact remains that their case is not *prima facie* proven by the government's enforcement action and that several substantial roadblocks stand in the way of any ultimate victory for plaintiffs on the merits. The settlement offer, therefore, is not inadequate as a matter of law and the fact that it consists of one fractional portion of the possible ultimate recovery rather than another is insufficient to indict its legal adequacy at the appellate level.

Even if, for the sake of argument, we assume that the District Court's approval of the settlement offer could be called into question because the settlement amounted to a given fractional portion of the ultimate possible recovery, reversal in this case would remain unwarranted. Appellants' argument would hinge entirely on their parallel asser-

it has tailored the market to dimensions of the defendants" and that this "gerrymandering market definition" resulted in a "strange red-haired, bearded, one-eyed man-with-a-limp classification." *United States v. Grinnell*, 384 U.S. at 590-591, 86 S.Ct. at 1714 (dissent of Fortas, J.). The *New York Times* reported that after having read Justice Fortas' opinion, Judge Wyzanski, the trial judge in the government case, stated that "Justice Fortas went to the heart of my error . . . . If I had heard him beforehand, I certainly would have rewritten my opinion." *The New York Times*, May 16, 1969, at 20.

tions that the settlement offer: (1) amounts to a mere twelve percent of the potential recovery as that recovery was computed by the District Court, and (2) in fact amounts to less than twelve percent of the real potential recovery which was grossly underestimated by the District Court. The facts do not bear out either of these claims. Contrary to appellants' assertions, the settlement offer was not twelve percent of the District Court's estimate of ultimate possible recovery; rather, it was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced.

In analyzing the propriety of the settlement offer before it, the District Court largely accepted the plaintiffs' claim that approximately \$330 million worth of defendants' billings to them during the 11¼ year damage period were artificially inflated by monopolistic pricing practices. The Court likewise accepted figures supplied by appellants to the effect that from three to seven percent of these billings represented unlawful monopoly profit. This meant that total possible liability for that period was between \$9.9 million and \$23.1 million. The District Court decided that the \$10 million settlement was "well within the ballpark." *Detroit v. Grinnell Corp.*, *supra*, 356 F.Supp. at 1386.

The District Court did not approve a settlement offer that amounted to twelve percent of plaintiffs' potential recovery. Appellants' twelve percent figure is based upon the assumption that potential recovery is not limited to single damages, but rather consists of treble damages. They therefore reach the conclusion, which they inexplicably attribute to the District Court, that ultimate recovery amounts to \$69.3 (3 x \$23.1) million (they ignore the lower end of the scale which they themselves established). On this basis they calculated that the \$10 million settlement offer amounted to only twelve percent [sic] of the \$69.3 million potential recovery.

Ignoring for the moment their use of only the top portion of the recov-

ery range, we find that their position turns on the question of whether treble damages ought to be used to calculate the potential liability. Appellants argue that trebling is compelled by the punitive provisions of the federal antitrust laws. The only authority which they have submitted on this issue is a recent unreported memorandum opinion of the United States District Court for the Eastern District of Illinois which holds that trebling of the base range is necessary because without it:

[T]he defendants would retain a substantial portion of any illegal gains rather than be penalized for their violations of the antitrust laws as Congress clearly intended by its provision for treble damages.

*Illinois v. J. S. Peterson Coal Co.*, Civil Action No. 71-C-2548, (E.D.Ill. May 29, 1973).

The Eastern District of Illinois, in turn, cited no authority for its position but rather relied exclusively on the observation that:

There is nothing in the language or the history of the antitrust laws which suggests that single recovery of the damages sustained by victims of antitrust violations who file claims is the proper measure of their recovery. The provision for treble damages is obviously contrary to such a conclusion.

*Id.*

While it is true that treble damages are extracted from a defendant who ultimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval to settlements which are traditionally based on an estimate of single damages only. See Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32

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ABA Section of Antitrust Law 98 (1966); Alioto, *The Economics of a Treble Damage Case*, 32 ABA Section of Antitrust Law 87 (1966). Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base liability figure would force defendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

In addition to their claim that the twelve percent recovery was unjust as a matter of law, appellants allege that the District Court substantially underestimated the ultimate recovery figure. They claim that ultimate recovery could well amount to \$170 million—almost eight times the maximum recovery calculated by the Court, and more than seventeen times the Court's minimum recovery estimate. There is no foundation for such claims.

Appellants first allege that the base recovery figure was substantially understated because it did not include any provision for the claimants' legal expenses.<sup>5</sup> Appellants are not asking that reasonable legal expenses for services actually rendered by their attorneys

be added to whatever settlement figure is finally agreed upon. Such a request would fly directly into the face of clear authority which holds that plaintiffs and not defendants are responsible for paying the fees of plaintiffs' attorneys. See *Philadelphia v. Chas. Pfizer & Co., Inc.*, 345 F.Supp. 454 (S.D.N.Y.1972); *Norman v. McKee*, *supra*.

Rather, appellants are asserting that the District Court was compelled to inflate its estimate of ultimate possible recovery by adding to it the attorney's fees authorized by Section 4 of the Clayton Act to plaintiffs who are victorious on the merits—a factor which would increase the potential recovery by as much as \$10 million.

This claim must fail for the same reasons that dispose of appellants' treble damage argument. The provision for recovery of attorneys' fees contained in Section 4 of the Clayton Act is dependent upon recovery of a judgment. *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426, 428 (2d Cir.), cert. denied, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928); *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F.Supp. 888 (S.D.N.Y. 1948). See also *Trans World Airlines, Inc. v. Hughes*, 312 F.Supp. 478, 483 (S.D.N.Y.1970), modified, 449 F.2d 51 (2d Cir. 1971), reversed on other grounds, 405 U.S. 915, 92 S.Ct. 960, 30 L.Ed.2d 785 (1972). Here, plaintiffs have settled in order to avoid the considerable risk that they would not be able to recover at all. There can be no warrant for urging that in such circumstances the court is required to add on the attorneys' fees that would accrue to plaintiffs only if they were successful in litigating these actions. To do so would be tantamount to a judicial assumption that settlement negotiations were predicated on defendants' admission of guilt. Such an assumption is contrary to the

5. Appellants judge that legal fees could reasonably amount to ten or fifteen percent of the liability. If liability amounts to \$69 million, as it would if treble damages were considered, then reasonable attorneys' fees

might amount to as much as \$10 million if victory on the merits were ultimately obtained. This would bring the base recovery figure to approximately \$80 million.

basic principles which underlie settlements.

The final portion of appellants' attack on the District Court's computations is the most extreme of all. They contend that the 11¼ years from April 13, 1957, to July 11, 1968, were erroneously denominated as the "settlement period." The true settlement period, according to appellants, should have also covered the "tacit conspiracy" era from 1947 to 1953. Once this is done, they calculate that an additional \$90 million should have been added to the potential recovery figure,<sup>6</sup> so that the total cumulative ultimate recovery of plaintiffs, assuming complete victory on the merits, would be in the neighborhood of \$170 million, of which the \$10 million settlement is between five and six percent.

This claim is rooted in the government enforcement action which found that, for the period between 1947 and 1953, defendants Grinnell and Holmes unlawfully conspired to commit anti-competitive acts with defendant ADT while they were unaffiliated companies and ostensible competitors acting under conditions of free and open competition. The lower court considered the possibility of an extension of the settlement period based on this "fraudulent concealment" theory and dismissed it, *inter alia*, because "the relationship between the defendants [as affiliated companies] was public and common knowledge for a long time." *Detroit v. Grinnell Corp.*, *supra*, 356 F.Supp. at 1387.

In order to establish fraudulent concealment, a claimant must show: (1) that defendants concealed the basic facts that would reveal the existence of their monopolistic behavior, and (2) that

plaintiffs were ignorant of those facts through no fault of their own. See *Moviecolor Ltd. v. Eastman Kodak Company*, 288 F.2d 80, 87 (2d Cir.), cert. denied, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed. 2d 26 (1961). See also *Baker v. F. & F. Investment Company*, 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 821, 91 S.Ct. 42, 27 L.Ed.2d 49 (1970).

Because the statute of limitations in private antitrust suits generally cuts off claims that arise more than four years before the inception of the government enforcement action which tolls that statute until one year after the conclusion of such action,<sup>7</sup> plaintiffs would have been required to present their proof of fraudulent concealment to recover any claims for the period before April 13, 1957 (the government's action having been filed on April 13, 1961). *Moviecolor Ltd. v. Eastman Kodak Company*, *supra*. If such surreptitious anticompetitive behavior could be demonstrated, the statute of limitations could be extended beyond its typical four year reach to the date when the concealment began. Like the institution of the government action, fraudulent concealment tolls the four year statute of limitations.

The operation of the "government toll" means that the earliest date to which this suit can be extended is April 13, 1957, four years before the commencement of the government enforcement action which tolls the statute under Section 5(b) of the Clayton Act. 15 U.S.C. § 16(b) (1970). One may tack the government toll on to the one arising from fraudulent concealment only if the acts of fraudulent concealment continued into or beyond the earli-

6. Total billings during this period amounted to \$400 million. Seven percent of that figure is \$28 million, which trebled equals \$84 million. If a hypothetical attorney's fee of \$6 million is added to this amount, the \$90 million figure can be obtained.

7. (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations

of any of the antitrust laws, but not including an action under section 15(a) of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . . 15 U.S.C. § 16(b) (1970).

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est day for which recovery could be sought due to the government toll—in this case, April 13, 1957.

Appellants argue that defendants were engaged in acts of fraudulent concealment between 1947, when defendants Holmes and ADT ostensibly terminated their unlawful written agreement of 1906 which divided business, market areas and customers, and 1953, when the continued affiliation between defendants became public knowledge through extensive newspaper publicity which resulted from Grinnell's acquisition of ADT and the Justice Department's inquiry into that acquisition. However, if the fraudulent concealment ended in 1953, then the cause of action for that period may be deemed to have arisen in that year. The earliest date to which this suit can be extended is April 13, 1957. Obviously, under these conditions, there is an unbridgeable gap between 1953 and 1957 and even if fraudulent concealment occurred during the 1947-53 period, suit on events which occurred at that time would be fruitless.

Appellants correctly point out that when an antitrust cause of action is concealed, the statute of limitations does not begin to run when the concealment ends, but rather when the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him on notice. *Tracerlab, Inc. v. Industrial Nucleonics Corp.*, 313 F.2d 97 (1st Cir. 1963); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir.), cert. denied, 358 U.S. 884, 79 S.Ct. 119, 3 L.Ed.2d 113 (1958). Once it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such dili-

gence. *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964); *Moviecolor Ltd. v. Eastman Kodak Co.*, *supra*; *Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp.*, 254 F.Supp. 855 (N.D. Ill.1966). See also *Dawson, Undiscovered Fraud and Statutes of Limitation*, 31 Mich.L.Rev. 591 (1933); *Dawson, Fraudulent Concealment and Statutes of Limitations*, 31 Mich.L.Rev. 875 (1933). Appellants have not even attempted to make such a showing. Their sole complaint is that appellees have not proven that each of the claimants had actual or constructive knowledge of the fraudulent concealment. However, the burden of proof is upon appellants and not upon appellees. Needless to say, they have neither carried nor attempted to carry this burden. In their reply brief, appellants reverse their field and argue that the fraudulent concealment may well have continued after 1953. They exclaim with some indignation that "there is not an iota of evidence and none is cited by defendants to support their bold assertion that the 'concealment ended' in 1953." Appellants' Reply Brief, at 8. (Emphasis supplied). This indignation is ironic in light of the fact that the consignment of the fraudulent concealment to the 1947-53 period was originally the work of the appellants and was simply assumed to be correct by the appellees for the sake of argument. Once again, appellants appear to be shifting to and fro in an attempt to conceal the flaws in their position. Since no appellant has ever tendered any proof to the effect that fraudulent concealment persisted after 1953, that issue must be considered as settled in favor of appellees.

The conclusion is inescapable that the base liability figure against which the District Court measured the settlement offer was in all respects an adequate and fair figure.

Appellants can muster no other arguments to support their contention that the settlement offer was legally inadequate. We, therefore, hold that the Dis-

trict Court's approval was justified and proper.

Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that, from all appearances, the vast preponderance of the class members willingly approved the offer. Only twenty objectors appeared from the group of 14,156 claimants. The total billings of the objectors consisted of approximately \$270,000 during the settlement period or approximately one half of one percent of the billings of all claimants. One hundred and fifty attorneys entered appearances for class members who filed claims; only five of these attorneys objected to the settlement in the court below; only one law firm pursued its objection to this Court. General approval of the terms of the settlement is further indicated by the fact that a number of plaintiffs in the individual subscriber non-class actions have decided to participate in it. Plaintiffs in only thirty-nine of the eighty-four individual cases have decided not to participate and their cases remain pending.

The favorable reception of the settlement offer at the hands of both plaintiffs and the individual attorneys who had little or nothing to do with the negotiation of the settlement is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion.

## II.

Appellants next argue that irrespective of the adequacy of the settlement offer, the District Court erred when it refused to permit an additional evidentiary hearing on the propriety of the settlement. They ask, at the very least, that this Court reverse and remand the cases with instructions to the lower court to afford them the opportunity to develop, through discovery, facts which might be germane to the propriety of the settlement.

The rule in this Circuit provides that an approval of a class action settlement offer by a lower court must be overturned if that court acted "without [knowledge of] sufficient facts concerning the claim" or if it "failed to allow objectors to develop on the record facts going to the propriety of the settlement." *Newman v. Stein, supra*, 464 F.2d at 692. Yet this directive must be read with the perspective provided by *Young v. Katz*, 447 F.2d 431 (5th Cir. 1971) which held that:

It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement . . . . Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable [citing *Neuwirth v. Allen*, 338 F.2d 2 (2d Cir. 1964)].

447 F.2d at 433.

See also *In re Riggi Brothers Co.*, 42 F.2d 174, 176 (2d Cir.), cert. denied sub nom., *Wood & Selick, Inc. v. Todd*, 282 U.S. 881, 51 S.Ct. 85, 75 L.Ed. 777 (1930). When a District Court exercises its authority in approving a settlement offer, it must give comprehensive consideration to all relevant factors and yet the settlement hearing must not be turned into a trial or a rehearsal of the trial. See also *West Virginia v. Chas. Pfizer & Co., supra*, 314 F.Supp., at 741, 440 F.2d at 1085-1086. The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.

The question becomes whether or not the District Court had before it

sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery. There is no doubt that it did. The Court specifically considered: (1) the complexity, expense and likely duration of the litigation, *Detroit v. Grinnell Corp.*, *supra*, 356 F.Supp. at 1388-1389; (2) the reaction of the class to the settlement, *Id.* at 1385-1386; (3) the stage of the proceedings and the amount of discovery completed, *Id.* at 1386; (4) the risks of establishing liability, *Id.* at 1388; (5) the risks of establishing damages, *Id.*; (6) the risks of maintaining the class action through the trial, *Id.* at 1389-1390; (7) the ability of the defendants to withstand a greater judgment, *Id.* at 1389; (8) the range of reasonableness of the settlement fund in light of the best possible recovery, *Id.* at 1387; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation, *Id.* at 1385.

Appellants argue that the hearing which did precede the court's approval mocked justice because they were not given any authority of discovery from which they could fashion an effective presentation. More specifically, the objectors argue that, as a result of their inability to make additional demands for defendants' records, the District Court at no time considered the type of economic data which they declare to be indispensable to any competent judicial evaluation of a settlement offer. To support their claim, the objectors cite

the Manual For Complex Litigation which provides that:

Particularly in civil antitrust class actions in which settlements are proposed is the need of the court for reliable economic data great. In the absence of reliable economic data concerning the damage suffered by each class and subclass as a result of the alleged illegal conduct, a rational determination of what is fair and reasonable cannot be made.

Manual For Complex Litigation § 1.46 (1973).

The general request by appellants for economic information focuses on "data showing class damages" and asks the defendants to supply: a comparison in several other areas of the nation of the differences between defendants' prices and the lower prices of their admittedly peripheral competitors; the number of defendants' competitors; the nature and extent of their competition; and the sizeable barriers to new entry in the industry. What the appellants really seem to be asking for is the right to *begin* discovery from first principles. The record discloses that a great deal, if not all, of this information already exists in the depository and could have come to the attention of appellants' counsel if he had expended the necessary effort.

Appellant's claim that there was a need for further discovery to develop the facts falls flat in view of the extensive evidentiary base already available at the document depository.<sup>8</sup> The objectors asked the Court below to allow them to conduct discovery and to subpoena witnesses for the settlement hearing.

8. The inventory of the depository includes documents produced to the government, depositions taken in the government case, the entire record in the government case, documents produced by and depositions of defendants taken in the Philadelphia actions, as well as hundreds of thousands of additional documents demanded pursuant to Rule 34 by the plaintiffs in these cases. In addition many documents produced by the discovery procedures in the instant cases were placed in the depository. These documents include many spreadsheets of painstakingly

assembled transaction data and calculations requested by plaintiffs to support damage theories they planned to assert. One answer by one defendant alone contains hundreds of thousands of statistics on transactions with subscriber plaintiffs. In addition, the documents produced by defendant ADT include the most detailed financial data (e. g., full revenue and cost analyses for each of its approximately 125 central stations) and more than 50,000 competition reports detailing the significant competitive factors pertinent to individual bids and transactions.

Counsel for appellants candidly admitted below, however, that he had not even read the record in the government enforcement action, nor had he spent much time in the document depository.<sup>9</sup> Rather, he remarked that it was not his duty to investigate the material that had already been produced. He claims that since the proponents of the settlement have the burden of justifying it to the satisfaction of the trial court, it remains their duty to produce documents and other evidence to substantiate the offer. He apparently feels that he may sit back and request the production of documents that have already been produced—documents with which he may be unfamiliar simply because he entered the litigation when it was already in an advanced stage.

In general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. Although the parties reaching the settlement have the ob-

ligation to support their conclusion to the satisfaction of the District Court, once they have done so, they are not under any recurring obligation to take up their burden again and again *ad infinitum* unless the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement. Its conclusion appears to have been reached only after a thorough investigation of all relevant facts.

### III.

The District Court reserved judgment as to whether a class action ought to be permitted under the circumstances when the parties indicated that such a suspension of judgment would aid their settlement efforts. The settlement itself assumed the existence of a proper class under Rule 23, and for the purpose of approving the settlement, the District Court acquiesced in that assumption. The objectors' third assertion of error focuses on the fact that the District Court approved the class action urged by plaintiffs for the purpose of settlement only.

It is difficult to pinpoint the direction of this particular allegation. On the one hand, appellants seem to be saying that the fact that the District Court assumed the existence of a viable class for the purposes of settlement and refused to make the same legal finding for all other purposes was legal error sufficient in and of itself to void the settlement agreement—even though we are never told exactly why this is so. On the other hand, they seem to argue that because the District Court found a viable class for the purpose of settlement it was le-

9. "The Court: How many days were you there (at the depository)?"

Mr. Kronfeld: We must have been at the depository at least four days.

The Court: What do you think you are going to get out of the depository in four days? The people in Chicago were there for three weeks, an individual plaintiff.

Have you gone through the government records from stem to stern?

Mr. Kronfeld: I have not, your Honor, but I have read the opinions of the courts and I have read some of the deposition testimony, and I have read some of the exhibits in the Government case . . . ."

Appendix. Vol. I, at 561.

gally compelled to make a formal holding along the same lines that would be binding on all aspects of the litigation. The value of this latter argument to the objectors is somewhat remote. Supposedly, if such a formal holding were compelled, that holding would significantly reduce the contingencies of litigation as far as the plaintiffs were concerned. Their chances of ultimate victory on the merits would thereby be strengthened and they would, therefore, be entitled to a larger fraction of the ultimate recovery figure. Even if the objectors' reasoning on this issue were flawless, the extent to which such a conclusion would affect the propriety of the \$10 million settlement is problematic at best. Fortunately, we are not to reach these heights of abstraction because we reject the initial premise of the argument.

The foundation of the objectors' claim can be found in the Manual For Complex Litigation (1973) which, in § 1.46, provides that:

Care should be taken to avoid undesirable, premature, unauthorized settlement negotiations in class actions. Before any settlement negotiations occur, there should be a [formal] class action determination. Thereafter, all settlement negotiations on behalf of the class should be conducted by counsel representing the class in litigation.

The Board of Editors that made this recommendation was influenced by many factors. Chief among these elements was the danger, recognized by the Third Circuit in *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, *supra*, that anyone

who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so be-

cause such an individual, lacking official status, knows that a negotiating defendant may not like his 'attitude' and may try to reach a settlement with another member of the class.

The attorneys' fees and prestige attendant upon probable appointment as class representative are the rewards for the attorney who bargains successfully with the defendants.

453 F.2d at 33.

The settlement in the case at hand was not negotiated in the early stages of the dispute. Here, all the parties had been able to assess the risks of success after almost four years of litigation. Similarly, the possibilities of internecine conflict were also neutralized by the fact that those national class representatives who had filed suit within the limitations period were all represented by the same counsel. No other representative surfaced until *after* the settlement agreement was reached and widely publicized. Thus, this is not a situation, such as that involved in *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, *supra*, where several different counsel were vying for recognition as class representatives; nor was it a case in which defendants were in any position to play one would-be representative off against the other. There is no allegation that the settlement conflicted with or was adverse to any class members' interest. The major concern of the Manual For Complex Litigation's recommendation against conditional approval of a viable class is absent in this case.

It is true that there were other, additional motivations behind the recommendation of the Board of Editors which proposed the Manual.<sup>10</sup> All of these rea-

10. Among the additional reasons stated by the Editorial Board are the following:

(1) Rule 23 [of the Federal Rules of Civil Procedure] does not authorize the formation of tentative classes for the purpose of settlement.

(2) There can be no assurance that the class members will be adequately represented in settlement negotiations until the

findings which are conditions precedent to the formation of the class are made by the court after an opportunity for an evidentiary hearing.

(3) . . . It will be impossible to determine . . . the amount of money which will be payable to each member of the class. This information would seem to be essential to making any rational

sons expressed in various ways, the Manual's dissatisfaction with the type of settlement which rested on a tentative acceptance of the class designation and was then ultimately forced upon the alleged class with an ultimatum that prevented any effective challenge to the settlement by simply giving class members the choice of accepting its benefits or litigating individually. The instant settlement contained no such harsh directive. Instead, it provided for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement.

To whatever minimal extent the action of the District Court violated the provisions of the Manual For Complex Litigation, it did so by applying the law in this Circuit. See *West Virginia v. Chas. Pfizer & Co., supra*; *Ace Heating & Plumbing Co. v. Crane Co., supra*. See also *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F.Supp. 146 (E.D.Pa.1967); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F.Supp. 1077 (E.D.Pa.1972), *rev'd* on other grounds, 487 F.2d 161 (3d Cir. 1973); 7A *Wright & Miller, Federal Practice and Procedure* § 1797 (1972). It must also be remembered that these recommendations were not meant to be intractable rules. If they were applied blindly and without an appreciation of their implicit limitations in given circumstances, they

might well jeopardize the right of many plaintiffs to recovery and even invite the likelihood that certain class action suits might never be settled at all.

#### IV.

Finally, the objectors have argued that the District Court was persuaded in its decision to approve the settlement by considerations which both lacked evidentiary support and were improperly entertained and which, therefore, constitute grounds for reversal. They urge two specific contentions: (1) that in approving the settlement offer the District Court improperly concluded that it seemed likely that the defendants would be financially incapable of paying a larger judgment, *Detroit v. Grinnell Corp., supra*, 356 F.Supp. at 1389 and, (2) that in approving the settlement offer, the District Court was impermissibly influenced by the likely burden on the judicial system that would accrue if settlement of this class action could not be obtained. *Id.* at 1388-1389.

Appellants point out that the District Court only addressed the financial capabilities of defendants AFA and Holmes and did not consider the financial status of either Grinnell or ADT, the two larger defendants. According to the appellants, the lack of a complete inquiry is inexplicable in light of the fact that the liability of the defendants here is both joint and several. See *Sabre Shipping*

choice whether to remain in the class and to accept the benefits of the settlement or to opt out.

(4) . . . there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered by the class.

(5) Formation of such a class preempts determination of whether the claim for relief should be litigated for the members of the class or should be the subject of further pretrial preparation with a view toward securing a better settlement or a trial on the merits . . .

(6) The formation of the tentative class for the purpose of settlement denies to the class member the choice contemplated by the amended Rule 23 to become a

member of the proposed class for the purpose of litigation with adequate representation as a member of the litigating class.

(7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party.

(8) Formation of such a class results in a long delay in preparation of the case for trial of those parties who desire to litigate their claims for relief.

(9) In the absence of reasonable discovery conducted on an adversary basis by counsel representing the class, it is impossible to determine whether the proposed settlement has any relation to the economic facts of life relevant to the case.

*Manual For Complex Litigation*, § 1.46 (1973).

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v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y.1969). Moreover, they argue, even if all four plaintiffs could be shown to be impecunious, consideration of that fact was not legally permissible.

Appellants have cited no authority for the proposition that the defendants' ability to pay is an improper consideration when approving a settlement offer. Likewise, we are unable to find any such authority. Common sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration. In fact, all available authority defies appellants' analysis. According to the United States Supreme Court: "Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee v. Anderson, supra*, 390 U.S. at 424-425, 88 S.Ct. at 1163. (Emphasis supplied.)

Although it is true that the District Court did not specifically find that Grinnell and ADT could not bear more than their portion of the settlement, it is obvious that these companies too have their financial limits, particularly in light of the fact that in addition to this \$10 million settlement, defendants have paid \$12 million to competitors and still have additional cases to defend.

Appellants scoff at the fact that the District Court was persuaded to some degree to approve the settlement offer because if settlement could not be reached, the 14,156 claims filed for the settlement period "[would have to be individually tried, requiring] about 14,000 trial hours on the damage claims alone . . . or about 11 years" and possibly "several judges and juries" so that a "huge amount of judicial time of any single judge and his court personnel would be devoted to the matter." *Detroit v. Grinnell Corp., supra*, 356 F.

Supp. at 1388-1389. They assert that no authority exists which in any way suggests that burden on the judicial system is a factor to be considered in justifying judicial approval of a class action settlement. Furthermore, they argue that: "The judicial system exists to dispense justice regardless of the burden that may be thrust upon it. And justice implies equal treatment of all litigants—not lesser treatment of those whose causes involve more of a burden on the judicial system than those of others." Appellants' Brief, at 47.

Appellants express an admirable sentiment, but until the day of unlimited judicial resources dawns, the fact will remain that each hour of judicial effort that is expended on the claim of one plaintiff will mean that fewer hours will be available for all others. Thus, the consideration of "judicial burden" does not really amount to a weighing of the interests of the courts against those of the plaintiffs, but rather it is a weighing of the *bona fide* interests of these plaintiffs against the interests of all others who are pursuing just causes of action. Likewise, even if the judicial system would undertake the herculean task which the objectors claim is their right to impose, they offer no proof that any judgment that would be reached eleven years hence would be sufficiently large, when discounted, to reward the class members for their patience.

The appellants sense the inconsistency of their argument when they conclude by assuring this Court that the trial, when it took place, would not be as unwieldy as the District court portends.

[T]he lower court clearly exaggerated the burden on the judicial system if these actions were tried on the merits. As this Court and the Judicial Panel have recognized, class action damage trials must be streamlined to permit recovery on the basis of statistical and other economic data.

Appellants' Brief, at 48.

Since there are few reported cases of class actions of this magnitude being lit-

igated all the way to final judgment on the individual class claims, it is not clear exactly how the trial could possibly be handled. Admittedly, the proof of damages in this type of case need not be made with precision and exactitude. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). Nevertheless, any suggestion that the alternative to the settlement of these actions is a relatively simple, quickly expedited, clearly defined pathway is both illusory and naive. On the contrary, it is obvious that litigating these cases to completion would take years—the real questions being how many years, at what cost, and with what result?

The evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice. *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972). The District Court has given us much more in this case.

A perusal of the District Court's opinion reveals without question that it was fully aware of the proper standards of settlement evaluation, that it applied each of those standards in its approval of this settlement, and that it entertained no improper considerations. Because the District Court applied the proper and normal standards in evaluating and approving the settlement offer, we can find no abuse of discretion on its part and, consequently, we affirm its decision.

11. Petitioner had filed a request for \$2.5 million in fees. See *Petition Of Counsel For The Class Representatives For Award Of Counsel Fees And Costs*, Appendix, Vol. II, at 101.

12. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may

### THE FEE AWARD

On December 27, 1972, the District Court rendered its decision approving the settlement and awarding attorneys' fees of \$1.5 million, plus disbursements of \$14,918.73, to David Berger and his law firm, David Berger, P.A.<sup>11</sup> A second group of appellants objects to the \$1.5 million counsel fee award made by the District Court. These appellants claim that this fee award was completely out of proportion to any services performed by counsel and that it reflects the District Court's *de facto* reliance on the contingent fee approach, an approach which, they submit, is impermissible in this type of case. Moreover, appellants point out that contrary to the suggestions of the Supreme Court of the United States and in violation of its own order, the District Court in this case awarded the fee without accepting any testimony, without holding an evidentiary hearing and with only the benefit of oral argument before it.

Because we feel that this fee was excessive and displayed too much reliance upon the contingent fee syndrome and because we feel that an evidentiary hearing was imperative in this case, we reverse and remand this portion of the District Court's judgment and direct that Court to hold such hearings, consistent with this opinion, to provide sufficient information so that a fair and adequate fee award may be made.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970),<sup>12</sup> which provides for the award of attorneys' fees in civil antitrust suits generally, does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or

sue therefor in any district court in the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee.

15 U.S.C. § 15 (1970). (Emphasis supplied).

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who settles his claim with the defendant. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (3d Cir. 1967). Similarly, Rule 23 of the Federal Rules of Civil Procedure has no fee provision. The only basis for awarding an attorney's fee in such cases is the equitable fund theory doctrine, which may be used to "make fair and just allowances for expenses and counsel fees to [those] parties promoting litigation. . . ." *Trustees v. Greenough*, 105 U.S. 527, 536, 26 L.Ed. 1157 (1881). "Allowance of such costs in appropriate situations" has been called "part of the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164, 59 S.Ct. 777, 779, 83 L.Ed. 1184 (1938). See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Under this theory claims may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants. The underlying principle here is that the members of the group should pay "compensation as was reasonable" above and beyond reimbursement for out-of-pocket expense to the attorney representing their interests. *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 125, 5 S.Ct. 387, 28 L.Ed. 915 (1885).

The practice of awarding attorneys' fees is one that has been "delicate, embarrassing and disturbing" for the courts. *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561, 569 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). This embarrassment is rooted in the fact that "the bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate through . . . their influence with the judiciary." *Graham, Guest Opinion on Legal Fees: Fluffing the Golden Fleece*, *Juris Doctor*, 10, 11 (February, 1973).

Unfortunately, there has been more than a little justification for the dissat-

isfaction of the lay community with the application of the equitable fund doctrine under Rule 23. Criticism has been rampant even within the judiciary. In *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221 (N.D.Ill.1972), the District Court observed that:

If Rule 23 is to be preserved against *deserved* criticism, some attempt must be made by the court to suit the award of the fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, "A lawsuit is a fruit tree planted in a lawyer's garden."

55 F.R.D., at 224. (Emphasis supplied).

In a similar vein the United States District Court for the Southern District of New York pointed out: "[I]t [the Rule 23 class action] has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y.1972). Finally, dissenting in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (*Eisen II*), then Chief Judge Lumbard wrote: "Obviously the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them." 391 F.2d at 571.

For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough*, *supra*, when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund." 105 U.S., at 536. See also *Wewoka v. Banker*, 117 F.2d 839, 841 (10th

Cir. 1941). The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objection to a petitioner's fee claim.

In its simplest terms, the purpose of the fee award is to "compensate the attorney for the reasonable value of services benefiting the . . . claimant." *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation*, *supra*, 487 F.2d, at 167. There are many parameters that affect the value of legal services and which, therefore, must be considered by a court in evaluating a fee request. In another recent antitrust case the District Court which granted the instant fee petition enumerated those parameters. In *Transworld Airlines, Inc. v. Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970), modified on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the District Court adopted the "generally accepted factors to be weighed in determining a reasonable attorney's fee" from *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa.1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), viz.:

- (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
- (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,
- (3) time and labor spent,
- (4) magnitude and complexity of the litigation,
- (5) responsibility undertaken,
- (6) the amount recovered,
- (7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff.

312 F.Supp., at 480.

Finally, the District Court added that the attorney's "risk in litigation" is another factor to be considered.

This conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it. That fact is brought home here by the opinion of the District Court which, while eschewing any reliance upon a percentage fee approach, ostensibly applied these cumbersome rules but nevertheless concluded that the fee award ought to amount to \$1.5 million, namely, fifteen percent of the settlement recovery.

As the Third Circuit has recently pointed out in *Lindy Bros.*, *supra*, more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance.

The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench

Cite as 495 F.2d 448 (1974)

will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation.

*Cherner v. Transatron Electronic Corp.*, 221 F.Supp. 55, 61 (D.Mass.1963).

Once the District Court ascertains the number of hours that the attorney and his firm spent on the case, it must attempt to value that time. Valuation obviously requires some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates). Once this information is obtained the easiest way for the court to compute value is to multiply the number of hours that each lawyer worked on the case by the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation.

A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate for compensation differs for different activities.

*Lindy Bros.*, *supra*, 487 F.2d at 167.

We are not under the illusion that a "just and adequate" fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees. However, we are convinced that this simple mathematical exercise is the only legitimate starting point for analysis. It is only after such a calculation that other, less objective factors, can be introduced into the calculus.

Perhaps the foremost of these factors is the attorney's "risk of

litigation," i. e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee. The tangible factors which comprise the "risk of litigation" might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn? Thus determined, the litigation risk factor might well be translated into mathematical terms.

It may be argued that by minimizing the important role traditionally played by the magnitude of the recovery, there will be considerably less incentive for the class attorney, particularly when negotiating a settlement, to seek as high a recovery as possible. Conversely, it can be complained that such a rule will encourage counsel to avoid quick settlement or, indeed, any settlement, in hopes of prolonging the proceedings and accumulating billable hours. Although there may be some truth in these arguments, we feel that their impact can be minimized by an intensified scrutiny on the part of the court which must approve each negotiated settlement.

When it sets a monetary value on a lawyer's services, the District Court must be in possession of an enormous amount of information. It must know how much each contributing lawyer devoted to each task resulting in the formation of the settlement fund; it must be aware of the billing rate properly applied to each of these manhours; and it must be sensitive to those factors, tangible and intangible, which comprise the "risk of litigation."

Because this information is so vital, Rule 11B of the Local Rules of the

Southern District of New York provides that:

Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct.

And, since resolution of disputed factual issues necessitates the hearing of testimony, see *Ellis v. Flying Tiger Corporation*, No. 71-1704 (7th Cir. October 27, 1972) and is particularly facilitated by cross-examination, see *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952), one appellate court has been prompted to hold that: "[A]lthough expert opinion evidence is not required in awarding attorneys' fees, where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required. See *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 988-989 (3d Cir. 1970), cert. denied, 401 U.S. 911, 91 S.Ct. 874, 27 L. Ed.2d 809 (1971)." *Lindy Bros., supra*, 487 F.2d at 169.

The Supreme Court endorsed this view in cases involving the award of attorneys' fees under Section 4 of the Clayton Act. In *Perkins v. Standard Oil Co.*, 399 U.S. 222, 90 S.Ct. 1989, 26 L. Ed.2d 534 (1970), the Court stated that: "[T]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of services rendered." 399 U.S., at 223, 90 S.Ct., at 1990 (Emphasis supplied). See also *West v. H. K. Ferguson Company*, 382 F.2d 630, 633 (10th Cir. 1967); In re *Hudson & Manhattan Railroad Compa-*

*ny*, 339 F.2d 114, 115 (2d Cir. 1964); In re *Hardwick & Magee Company*, 355 F. Supp. 58, 75 (E.D.Pa.1973); *Lewis v. Wells*, 325 F.Supp. 382, 387 (S.D.N.Y. 1971).

In the instant case the District Court sent a legal notice, dated December 13, 1971, to all class members informing them of the prospective settlement. Paragraph 6 of that notice proclaimed that:

[T]he Court has directed that a hearing be held on April 27, 1972

[A]ny member of the class who has not requested exclusion and has timely filed a Sworn Statement of Claim may appear at such hearing in person or by counsel and may show cause, if any he has, why fees and allowances should not be granted and why judgments thereon should not be entered, and may present any evidence that may be proper and relevant to the issues to be heard.

Appendix, Vol. II, at 78.

Contrary to the terms of this notice, the Court made its fee award after it had refused to hold an evidentiary hearing, Hearing of April 10, 1972, at 3, and with only the benefit of oral argument and submitted papers to guide it, in spite of the fact that counsel for the appellants stated to the Court that he "proposed to present evidence" on the matter of the fee application. Excerpts from Transcript of Hearing Before Judge Metzner, May 24, 1972, Vol. II, at 504; Excerpts from Transcript of Hearing Before Judge Metzner, June 5, 1972, Vol. II, at 558. The most basic dispute focuses on petitioner's claim, rejected by both appellants and third parties, that he and the members of his firm expended 2,357 hours in the litigation of this case.<sup>13</sup> See Statements of Messrs. Rob-

13. Appellee Berger claims to have expended 2,357 hours of attorney's time on behalf of these plaintiffs without regard to the type of work and by whom performed, namely, partner, senior associate, junior associate or clerk. The District Court fee award of \$1.5

million thus compensated him at the rate of \$635 per attorney-hour.

Appellee has attempted to justify his fee by pointing to other cases where the fee awards were even more grandiose. He observes that in one dispute litigated in the

inson, Hoffman & Stein, Appendix, Vol. II, at 270, 296, 242. There is no doubt that, in a case such as this, where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative.

Even if there were no disputes over the claims made by petitioner, there would still remain a need for an additional hearing to fill the many factual voids which remain before an adequate fee can be fairly determined. Petitioner lumps together the hours for four lawyers in his office whom he calls "senior attorneys" and who allegedly spent 1,814 hours on this case, yet he does not define what he means by the term "senior attorney". Petitioner, likewise, provides no breakdown of any of the time claimed into the various facets of the case. It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties.

The court will need to know the experience and training of petitioner's paraprofessional assistants and the rate at which he pays them since he must be reimbursed for their wages even though their time cannot be considered as input in the fee award determination. See *In re Hardwick & Magee Co.*, *supra*, 355 F.Supp. at 58, 73; *Trans World Airlines*, *supra*, 312 F.Supp., at 482. Finally, there is insufficient evidence regarding petitioner's separate fee arrangements with various members of the classes he represented. Such information is vital to the determination of a fair and adequate fee. *Lindy Bros.*, *supra*, 341 F.Supp., at 1090.

The guidelines to be followed on such a hearing which we adopt have been well summarized in the *Lindy Bros.* case, *supra*, 487 F.2d, at 167, 170.

New York State courts, a distinguished practitioner was compensated at the rate of \$3,590 per hour. *Sullivan and Cromwell v. Hudson and Manhattan Corporation*, 35 A.D.2d 1084, 316 N.Y.S.2d 604 (1st Dep't 1970), *aff'd*, 29 N.Y.2d 523, 324 N.Y.S.2d 79, 272 N.E.2d 572 (1971).

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To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities, *e. g.*, pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, *e. g.*, senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate).

Further, in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion, particularly where, as in this case, the judge determining the fees to be awarded did not sit in the case throughout the entire proceeding. The value to be placed on these additional factors will, of course, vary from case to case. Often, however, their value will bear a reasonable relationship to the aggregate hourly compensation.

We conclude, as did the Circuit Court in *Lindy Bros.*, *supra*, that "the failure of the district court to hold an evidentiary hearing and its failure to follow

However, instead of bolstering his position, these observations merely illustrate the results that accrue when a fee is awarded on a contingency basis without reference to the labor actually expended on the client's behalf.

proper standards in awarding fees to attorneys Kohn and Berger were inconsistent with the sound exercise of discretion."

### FEE APPORTIONMENT

In addition to the fee petition of counsel for the class representatives, at least three other fee petitions were presented to the Court below.

The three firms of (a) Weil, Gotshal & Manges, (b) Liebman, Eulau, Robinson & Perlman, and (c) Parker, Chapin & Flattau, constitute the so-called "troika", counsel for a number of individual plaintiffs. The "troika" has laid claim to twenty-five percent of the fee awarded class counsel on the ground that their efforts contributed to the formation of the settlement fund. A second attorney, Joel E. Hoffman, of Wald, Harkrader & Ross, likewise filed a petition, Application of Wald, Harkrader & Ross For Apportionment of Counsel Fees, Appendix, Vol. II, at 236, for ten percent of any fee awarded class counsel on the ground that his participation in the pre-trial proceedings conferred a benefit on the class. Finally, Pritchard, McCall & Jones, counsel for certain other plaintiffs, also sought fees for work done in their client's behalf. Application of Pritchard, McCall & Jones For Allowance of Attorneys' Fees, Appendix, Vol. II, at 230.

The District Court held that the three law firms constituting the "troika", along with the firm of Wald, Harkrader & Ross, had standing to assert claims against the fee awarded class counsel. *Detroit v. Grinnell Corp.*, *supra*, 356 F. Supp. at 1393. The Court said that it would set a date for a hearing to determine whether any benefits accrued to the national classes from the activities of these other counsel, and whether the Court should, in equity, award them part of class counsel's fees. *Id.* The Court denied the fee application of Pritchard, McCall & Jones.

Appellants contend that none of these additional fee applications should

be entertained by the District Court. Since none of these fees has as yet been allowed, this question is not yet ripe for review and we therefore dismiss this portion of the appeal for lack of jurisdiction.

The basic policy of the federal courts has been that appeal will lie only from a "final decision." *Cobbledick v. United States*, 309 U.S. 323, 324, 60 S.Ct. 540, 84 L.Ed. 783 (1940). "[A] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). Obviously, the District Court's holding with respect to the standing of the additional petitioners is anything but a "final decision". To support their position appellants are forced to rely on the "collateral order" exception to the final judgment rule which was stated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Company*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). An order which would otherwise be nonappealable may be appealed when it

appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

*Cohen, supra*, at 546, 69 S.Ct., at 1226.

These appellants have not demonstrated the applicability of the *Cohen* exception. Indeed, the very language of the *Cohen* decision militates against the appealability of this portion of the District Court's opinion. The Supreme Court specifically cautioned that the exception does not apply "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge." *Cohen, supra*, at 546, 69 S.Ct., at 1225. There can be no doubt that the District Court's recogni-

tion of standing and call for a hearing on the fee applications fits squarely into the definition of an act which is merely a "step . . . toward final judgment in which [it] will merge." *Compare* Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965). A final judgment will arise only when the District Court makes a final apportionment of the fee.

The judgment approving the settlement is affirmed; the judgment as to the fee award is reversed and remanded for a hearing in accordance with this opinion; the judgment relating to the standing of other attorneys to participate in any fee award is dismissed for lack of appellate jurisdiction. Costs to abide the event.

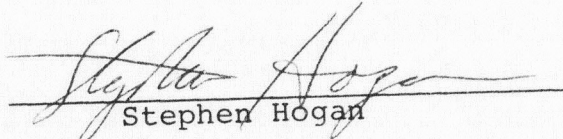


IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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CITY OF DETROIT, et al., :  
v. : Nos. 76-7252  
GRINNELL CORPORATION, et al. : 76-7253 and  
76-7254  
BAY FAIR SHOPPING CENTER, :  
et al., Claimants, :  
Appellants. :  
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Certificate of Service by Mail

I hereby certify that on or before the 30th day of August, 1976, three (3) copies of the annexed BRIEF OF COUNSEL FOR CLASS REPRESENTATIVES-APPELLEE were served upon G. Joseph King, attorney for Appellant, at Howrey & Simon, 1730 Pennsylvania Avenue, N. W., Washington, D. C., 20006, by depositing said copies in the United States mail, postage prepaid.

  
Stephen Hogan

